Valley Slurry Seal Company *and* Construction and General Laborers' Local 185; Northern California District Council and Laborers International Union Organizing Department, Inc; Laborers International Union of North America, AFL–CIO *and* Northern California District Council of Laborers; and Laborers International Union Organizing Department, Inc; Laborers International Union of North America, AFL–CIO. Cases 20–CA–30721–1, 20–CA–30973, 20–CA–30721–3, 20–CA–30721–4, and 20–CA–30721–5

September 30, 2004

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On December 12, 2003, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] to modify the remedy,[3] and to adopt his recommended Order as modified.[4]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We disagree with the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act when, after finding a union handbill on his truck, Foreman Anson Jones "said that if that asshole puts any more shit on my windshield, I'm going to kick his ass." We find that, considering all the circumstances, Jones' remark would reasonably have been understood by employees as a personal, subjective reaction, and not as a communication by the Respondent. Therefore, we find it unnecessary to reach the issue of whether Jones was an agent of the Respondent. Accordingly, we dismiss this allegation of the complaint.

Member Walsh would adopt the judge's finding of a violation for the reasons stated in the judge's decision.

[3] We modify the judge's remedy to provide that backpay for employee Jimmy Isaacs shall be computed as prescribed by *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as computed according to *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[4] We shall modify par. 2(a) of the judge's recommended Order to conform to the Board's standard remedial language.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Valley Slurry Seal Company, Sacramento, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(f) and reletter the subsequent paragraphs.

2. Substitute the following for paragraph 2(a).

"(a) Make John Michael Shawn Emminger, Frank Settecase, Eric Henderson, Patrick McQuerry, and Jimmy Isaacs whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner proscribed in the remedy section of this decision."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 30, 2004

Peter C. Schaumber, Member

Dennis P. Walsh, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate our employees with regard to their union sympathies or activities.

WE WILL NOT threaten our employees that selecting Construction and General Laborers' Local 185, Laborers International Union of North America, AFL–CIO (Laborers Local 185) as their bargaining representative would result in harsher working conditions, including loss of subsistence pay.

WE WILL NOT prohibit our employees from discussing their terms and conditions of employment with their fellow employees or threaten to retaliate against them for such acts.

WE WILL NOT inform our employees that reductions in their terms and conditions of employment resulted from their support for Laborers Local 185.

WE WILL NOT threaten our employees with adverse consequences to their terms and conditions of employment, including reduced wages and benefits, because of their support for Laborers Local 185.

WE WILL NOT increase the amount of our daily subsistence pay to employees for work outside the Sacramento area in order to induce them to stop supporting Laborers Local 185.

WE WILL NOT lay off our employees because of their activities in support of Laborers Local 185.

WE WILL NOT eliminate the subsistence pay and, subsequently reinstate such pay at a reduced rate, of our employees in retaliation for their relatives' and our employees' support for Laborers Local 185.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make John Michael Shawn Emminger, Frank Settecase, Eric Henderson, Patrick McQuerry, and Jimmy Isaacs whole for any wages and benefits lost, with interest, as a result of our discrimination against each of them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to our unlawful layoffs and cessation of subsistence pay and, WE WILL, within 3 days thereafter, inform the above-named individuals that such has been done and that our unlawful actions will never be used against them in any way.

VALLEY SLURRY SEAL COMPANY

Lucile L. Rosen, Esq., for the General Counsel.
Robert L. Rediger, Esq. and *Laura C. McHugh, Esq. (Rediger, McHugh & Hubbert, LLP)*, of Sacramento, California, appearing on behalf of the Respondent.
Antonio Ruiz, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of Oakland, California, appearing on behalf of the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. Construction and General Laborers' Local 185, Laborers International Union of North America (Laborers Local 185) filed the original unfair labor practice charge in Case 20–CA–30721–3 on August 27, 2002,[1] and the first amended and second amended unfair labor practice charges in Case 20–CA–30721–3 were filed by Northern California District Council of Laborers (NCDCL) and Laborers International Union Organizing Department, Inc. (LIUOD) on September 5 and October 25, respectively. Laborers Local 185 filed the original unfair labor practice charge in Case 20–CA–30721–4 on August 27, and NCDCL and LIUOD filed the first amended and second amended unfair labor practice charges in Case 20–CA–30721–4 on September 5 and October 25, respectively. Laborers Local 185 filed the original unfair labor practice charge in Case 20–CA–30721–5 on August 27, and NCDCL and LIUOD filed the first amended and second amended unfair labor practice charges in Case 20–CA–30721–5 on August 27 and October 25, respectively. Based upon investigations of the unfair labor practice charges in Cases 20–CA–30721–3, 20–CA–30721–4, and 20–CA–30721–5, on October 31, 2002, the Regional Director for Region 20 of the National Labor Relations Board (the Board) issued a consolidated complaint, alleging that Valley Slurry Seal Company (Respondent) had engaged in, and continues to engage in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). NCDCL and Laborers International Union of North America (LIU) filed the original and first amended unfair labor practice charges in Case 20–CA–30721–1 on June 14 and January 30, 2003, respectively, and NCDCCL and LIU filed the original and first amended unfair labor practice charges in Case 20–CA–30973 on December 4, 2002, and January 30, 2003, respectively. Based upon investigations of the unfair labor practice charges in Cases 20–CA–30721–1 and 20–CA–3073, on February 12, 2003, the Regional Director for Region 20 of the Board issued a consolidated complaint, alleging that Respondent had engaged in, and continues to engage in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. Respondent timely filed answers to both consolidated complaints, essentially denying the commission of any of the alleged unfair labor practices. Pursuant to notices of hearing, the above-captioned matters came to trial before me in Sacramento, California, on April 1 and 2 and June 10, 2003. At the trial, I granted counsel for the General Counsel's motion that the above-captioned matters be consolidated for trial, and I afforded all parties an opportunity to examine witnesses, to cross-examine witnesses, to offer into the record all relevant documentary evidence, to argue their legal positions orally, and to file posthearing briefs. The latter documents were filed by counsel for the General Counsel and by counsel for Respon-

[1] All dates herein occurred during calendar year 2002, unless otherwise stated.

dent, and each has been carefully considered.[2] Accordingly, based upon the entire record herein, including the posthearing briefs and my observations of the testimonial demeanor of each of the several witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent, a corporation, with an office and place of business in Sacramento, California (Respondent's facility), has been engaged in the building and construction industry, performing pavement preservation work. During the calendar year 2001, which period is representative, in the normal course and conduct of its business operations, Respondent performed services, valued in excess of $50,000, for various cities and counties in the State of California, each of whom meets a Board standard for the assertion of jurisdiction on a direct basis. Respondent admits that, at all times material, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that, at all times material, Laborers Local 185 has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

The consolidated complaints allege that Respondent violated Section 8(a)(1) and (3) of the Act by laying off its employee, John Michael Shawn Emminger, from May 13 until June 3 because of his support for Laborers Local 185; by laying off its employees, Frank Settecase, Eric Henderson,[3] and Patrick McQuerry,[4] from August 22 through late September because of their support for Laborers Local 185; and by eliminating subsistence pay to its employee, Jimmy Isaacs, from on or about July 2 until the first week of August and, in or about the first week in August, reinstating his subsistence pay at a reduced rate because of his support for Laborers Local 185. Further, the consolidated complaints allege that Respondent violated Section 8(a)(1) of the Act by threatening its employees with the elimination of subsistence pay if they selected Laborers Local 185 as their collective-bargaining representative; by threatening its employees with the elimination of subsistence pay, medical benefits, uniforms, and with the loss of work and reduced wages if they selected Laborers Local 185 as their collective-bargaining representative; by threatening its employees that it might close its operation if they selected Laborers Local 185 as their collective-bargaining representative; by threatening its employees with physical violence if they distributed Laborers Local 185 flyers; by telling employees not to talk about wages and other benefits or they would by laid off for lack of work; by interrogating its employees concerning their activities in support of Laborers Local 185; by threatening its employees with the elimination of subsistence pay if they spoke to other employees about such pay; by telling employees their subsistence pay had been eliminated because of Laborers Local 185; and by increasing its employees' daily subsistence payments from $50 to $57 per day in order to induce them to cease supporting Laborers Local 185. While essentially denying the commission of the alleged unfair labor practices, Respondent contends that it laid off Emminger for legitimate business reasons, laid off Settecase, Henderson, and McQuerry for lack of work, increased its employees subsistence payments after conducting a survey, and eliminated Isaacs' subsistence after announcing a change in its subsistence pay practices.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Respondent, a corporation, is a wholly owned subsidiary of Basic Resources Corporation and maintains an office and a yard/maintenance facility located in Sacramento, California. The record establishes that Respondent is engaged in the building and construction industry as a "pavement maintenance company," primarily[5] performing pavement resurfacing work for State of California, county, and city agencies; that its primary product is a slurry seal, which is composed of aggregate and emulsion and which is used to resurface existing asphalt pavements on highways, streets, and roads; that Respondent's other products include a derivative of slurry seal, called microsurfacing, which, when applied to asphalt, dries much quicker than slurry seal, and seal coating, which is typically used to resurface and rejuvenate parking lots; that, given the nature of its product, which requires dry surfaces, and, given the normal California weather pattern of winter rains, Respondent's yearly business is seasonal normally starting in March or April and ending with the first heavy rains in November or December; that, during 2002, Respondent's business operations were con-

[2] Counsel for Respondent filed a motion to strike portions of the counsel for the General Counsel's posthearing brief, and the latter filed an opposition to the motion. I note, at the outset, that counsel for the General Counsel did, in fact, misstate portions of the record in her posthearing brief. However, inasmuch as I engage in an independent analysis of the record and do not rely upon counsel, in their posthearing briefs, in order to formulate an accurate version of events and as I am more concerned with the legal arguments of counsel rather than with their recitations of fact, I see no purpose to strike any portion of counsel for the General Counsel's posthearing brief and shall deny counsel for Respondent's motion.

[3] Henderson testified on the first day of the trial; however, after he stated he was not able to understand counsel for the General Counsel's questions because he had been taking an increased dosage of a stress-reduction medication, I excused him from continuing to testify that day but with the understanding he would have to resume testifying when he became adjusted to his medication. Accordingly, the hearing was continued to a later date. On that day, June 10, 2003, notwithstanding having assured counsel for the General Counsel he would be present, Henderson failed to appear. In these circumstances and as he was not subjected to cross-examination, I granted counsel for Respondent's motion to strike his trial testimony.

[4] This appears to be the correct spelling of his name. Although served with a subpoena, as he "was thinking about" visiting his family in Mexico rather than testifying in his own behalf, McQuerry failed to appear and testify at the trial. Of course, it is clear Board law that an alleged discriminatee need not appear at the hearing and testify in his or her behalf. If evidence of a violation of Sec. 8(a)(1) and (3) of the Act is established, he or she is entitled to a remedy despite failing to appear. *Kajima Engineering & Construction,* 331 NLRB 1604 (2000).

[5] Perhaps 15 percent of Respondent's work is for private entities.

centrated in the northern California area;[6] and that, during a typical season, Respondent utilizes three to five slurry seal crews, one seal coating crew, and one paving crew to perform its work The record further establishes that, at all times material herein, Jeffrey Reed has been the president of Respondent, Michael Heath has been its general superintendent and operations manager, and Mike Wallen has been its project superintendent and that Respondent admits that each has been a supervisor within the meaning of Section 2(11) of the Act and its agent within the meaning of Section 2(13) of the Act. Finally, as set forth above, Respondent utilizes crews of employees to perform its work, which may be hundreds of miles from Respondent's facility in Sacramento. There are between 7 and 12 employees on each of Respondent's crews, which are comprised of an operating foreman, who operates the machine which produces and dumps the resurfacing material on the ground and who directs the work of the crew, squeegeemen, whose job is to smoothly and evenly spread the sealant material over the entire area being resurfaced, using an implement akin to a long-handled broom, traffic control workers, whose job is to set the cones and barricades, closing the area, which is being resurfaced to vehicle and pedestrian traffic, shuttle drivers, who bring the resurfacing material to the jobsite, and stockpilers, who unload the resurfacing material from the trucks and load said material into the resurfacing machine.

The record reveals that, in the first week of May 2002, Jerry Morales, the director of organizing for the NCDCL, paid an unannounced visit to Respondent's office in Sacramento and met with Jeffrey Reed in a conference room. During their meeting, Morales informed Reed that, inasmuch as the LIU had been successful in organizing Respondent's competitors in southern California, "we would be talking to his workers again to accept the agreement of the current time."[7] Further, Morales told Reed, "[T]hat I had already spoke to some of his workers" and that "I would be talking to the rest of his workers." Also, Morales said that, given the new southern California collective-bargaining agreement, "we would like to be able to do this up here and he is one of the biggest contractors up here . . . . He indicated . . . that he had several problems," including an earlier organizing campaign by the Operating Engineers Union "against some family members." That campaign had culminated with the union winning an election but being unable to secure a collective-bargaining agreement. Morales replied that the LIU was not the Operating Engineers. To this, Reed beseeched Morales to speak to his employees "as he did not have a problem with that." Morales said that what the LIU wanted was to have Respondent agree to recognize it as its employees' bargaining representative and to sign a collective-bargaining agreement, and Reed responded, "[G]o talk to my guys and we'll talk about that later." Subsequently, according to Morales, on or about May 10, while he was having lunch with other NCDCL officials in the downstairs area of the Rusty Duck restaurant in Sacramento, Reed, who was present at the restaurant for a delayed Christmas party for his Company's employees,[8] approached his table and, after saying their meeting was quite a coincidence, "asked that I not do anything that would in any way ruin the Christmas party, and my statement . . . was I've already told you I will be talking to your people, but I'm not here to destroy any Christmas party or anything like that." With regard to the party, according to alleged discriminatee, Frank Settecase, during a speech to the assembled employees, Reed mentioned Laborers Local 185, saying the labor organization "wouldn't be in our best interest as a company."[9]

Alleged discriminatee John Michael Shawn Emminger testified that, upon being informed of a job opening by his stepfather, Jimmy Isaacs, on May 25, 2001, he applied for a job with Respondent and was hired by Mike Wallen, Respondent's project superintendent, as a traffic control employee on a crew, working in the Santa Barbara area.[10] Emminger, who resides in Barstow, California,[11] worked on that job until early January 2002 when Wallen informed him his work "was done for that year." According to Emminger, he learned that Respondent's 2002 season had commenced from Isaacs, who told Emminger that "he [had been] contacted and told to come back. He asked about me and was told to bring me along." Thereafter, in early April, he reported for work at "at the yard in Sacramento," was assigned to the slurry seal crew, for which Anson Jones was the operating foreman, as a traffic control worker, and, during that month and May, worked on jobs in Merced and in Sacramento. Emminger further testified that, upon receiving his first paycheck for 2002, he noticed that his rate of pay had been reduced to $15 per hour, and he immediately placed a telephone call to Mike Wallen, who was not available and who failed to return the telephone call. However, shortly thereafter, on April 30, while working on a jobsite in Sacramento, Emminger saw Wallen, approached, and "I . . . asked him about my pay cut, and he said he'd look into it." A "few" days later, on a jobsite next to McKinley Park in downtown Sacramento, with Jimmy Isaacs standing next to him, Emminger again spoke to Wallen and asked the latter if he had learned anything about why his (Emminger's) base pay had been reduced. "He said, yes. He told me that my pay was cut to $15 per hour" and "to be lucky

[6] Apparently, at least through 2001, Respondent maintained an office, had crews of employees, and regularly performed paving work in the southern California area. Commencing in 2002, all of Respondent's employees were based in northern California, and it only occasionally bid upon and worked on jobs in southern California.

[7] According to Morales, the LIU had reached a collective-bargaining agreement with "most" of the slurry seal contractors in southern California, and, concomitant with this agreement, Respondent ceased its operations in southern California.

[8] The record discloses that Respondent had held Christmas parties for its employees in the past but always during December.

[9] In her posthearing brief, counsel for the General Counsel attributes other comments to Reed and asserts that the comments are "relevant" to Respondent's knowledge of the LIU's organizing efforts and Respondent's subsequent acts and conduct. However, she failed to cite to the portion of the transcript at which Reed's words are found, and my own scrutiny of the record does not disclose their source. In these circumstances, I am unable to make findings as to Reed's asserted comments.

[10] Emminger earned $17 per hour for this work and received medical benefits. Also, he was given 13 sets of uniforms, consisting of an orange shirt, with a company logo, and brown pants. According to the alleged discriminatee, he was required to pay for the uniforms by deductions from his paychecks. In addition, Emminger received a $30-daily subsistence payment, working for Respondent in Santa Barbara.

[11] Barstow is located in southern California.

it was that much." Wallen added that "base pay for traffic control is $8 per hour and that my subsistence was being cut as well." Wallen continued, saying, "[T]he subsistence would not be for weekends . . . I was not there to work."[12] He added "that the company would provide a vehicle for transportation to and from work on those non-work weekends. And that if I was to tell anybody, I'd be laid off for lack of work."[13] When specifically asked about this conversation, Isaacs could only recall Wallen saying that Respondent "would not be giv[ing] this weekend subsistence any more unless we were working the weekend."[14]

According to Emminger, having become aware during the 2001 work season that a union had once represented Respondent's employees, in March, prior to reporting for work with Respondent the following month, he telephoned a LIU local union's office in southern California and was put in contact with Jerry Morales. Thereafter, Emminger testified, after commencing work with Respondent in April, he and Isaacs met with Morales at a restaurant in west Sacramento, and Emminger agreed to speak to other employees about representation by the LIU and to solicit them to sign authorization cards on behalf of the LIU. Morales gave Emminger authorization cards, and the latter testified that he subsequently spoke to approximately 20 of Respondent's employees, soliciting their support for the Laborers and their signatures on the authorization cards. According to Emminger, these conversations always occurred in the evening "after work in public places." He was careful not to permit "anyone" to observe his solicitations, and he never noticed any managers engaging in surveillance of his activities on behalf of the LIU.

Emminger testified that, pursuant to Wallen's early May offer, when no work was scheduled, he utilized a company truck to make round trip weekend visits to Barstow "two or three times," that each way was a 7-hour drive, and that he used a company gas card to pay for gasoline.[15] One such trip to southern California was over the weekend of May 9 through 12, and he reported for work with the truck early in the morning on May 13. A job that morning was scheduled to commence at 8 a.m. in Sacramento, and, while driving toward the jobsite, Emminger called Wallen on a company-issued cellular telephone in order to confirm information, which he had received from a company mechanic, who told him that no company vehicles were allowed for use on personal trips outside the Sacramento area. He asked Wallen if this information was correct, and Wallen replied, "[Y]es, that's right. My foremen are allowed to drive company vehicles for non-work use." Then, according to Emminger, Wallen "asked me if I had contacted the Union or had they contacted me. . . . I told him no. . . . I had not contacted or been contacted by the Union." Emminger further testified that, approximately 2 hours later, between 10 and 11 a.m., while he was working, Wallen telephoned him. "He told me that I would no longer be needed in Sacramento for the rest of the week . . . . due to the fact that jobs had been postponed" and "that I would be contacted with flight information for a flight to back home."[16] Emminger returned to Barstow, and, 2 days later, telephoned Wallen and asked if there was any work. Wallen said no as there were "more than enough people for a weekend job." Wallen added that Emminger was "kind of laid off" but should call back at a later date. On the following Sunday, the alleged discriminatee again telephoned Wallen about the availability of work, and the latter said that Respondent probably would not need Emminger again until July or later and that he should consider himself laid off. Subsequently, at the end of May, Wallen telephoned Emminger and instructed him to report to Respondent's office in Sacramento on June 3 "ready for work." However, when, as instructed, the alleged discriminatee arrived at Respondent's office on the morning of June 3, he was taken into a conference room in which Wallen, Mike Heath, and Jeffrey Reed's secretary were waiting. Wallen and Heath began questioning Emminger about his use of the company gas card for three weekend trips to and from Barstow and then informed him that, as he had "abused" the company gas card, he was being suspended "pending an investigation" of his personal use of the credit card on a personal vehicle for approximately 3 weeks.[17]

With regard to the layoff of the alleged discriminatee, Mike Wallen testified that Emminger and Jimmy Isaacs[18] were recalled for work in April 2002 in accord with Respondent's practice to "bring as many employees back on board primarily so they don't go out and find other jobs, trying to keep crews

[12] The record establishes that Respondent makes a $50-daily subsistence payment to its employees, who are working more than 75 miles from Sacramento. In addition, when Respondent closed its southern California operations, at least five employees, who lived in southern California, continued to work for it in northern California, and, through July 2002, in order to retain these individuals, Respondent made daily $50-subsistence payments to these employees notwithstanding whether they worked within 75 miles of Sacramento.

[13] When shown R. Exh. 1, a document entitled "Employer Property Return Agreement," which bears his signature and which appears to be a receipt for items received, including a Nextel "flip phone," Emminger testified that he recognized "most of it" but not the three paragraphs between the listed items and his signature. He added that those were not on the document at the time he signed it.

[14] Shown R. Exh. 1 during direct examination, Isaacs testified that he signed and dated a similar document in June 2000 but that he did not remember the three paragraphs between the listed items and his signature. However, during cross-examination, after being shown the two property receipt forms, which he signed and which contain the same three paragraphs as are in R. Exh. 1, Isaacs admitted that his prior testimony "had to have been" in error.

[15] Of course, this testimony makes no sense. Thus, by Emminger's own account, Wallen did not give him permission to use a company vehicle for weekend trips home until early May. As Emminger was laid off on May 13, he could not have used the company vehicle to make two or three weekend trips home.

[16] Emminger did not know of any other employees, who were sent home that day.

[17] According to Emminger, Alan Berger, Respondent's vice president, had given the fuel card to him at the time of his hire. The first sentence of the second of the disputed paragraphs on R. Exh. 1 reads "I also agree that any and all credit card purchases shall be for the benefit of [Respondent] only, and at no time will I use a company credit issued credit card for my personal use and/or benefit."

[18] Isaacs possesses a class A commercial driver's license, permitting him to drive a truck. According to Wallen, "[T]hat's actually a priority in our line of work."

staffed is sometimes a bit of a problem, but if we keep them busy, we know they are going to stick around." Emminger was placed on Anson Jones' crew, which performed work on jobs in Merced and Sacramento. In the first week of May, according to Wallen, he spoke to Jones' crew in a group setting, and, as "they were are always interested in when and where is the next job," he informed them "that there was [a] lack of work coming up." Wallen further testified that the next job for Jones' crew was a job in Redding, which required just six or seven employees; "Emminger had been in town away from his family since early April, and we tried to get all of our crewmembers, if we are out of town, back to their family members every other week. Since he had been away the longest, we sent him home." Thereafter, according to Wallen, there was just a 1-day job in Redding, a 2-day job in Sacramento, and "with nothing following after that, I didn't see it necessary to bring Mr. Emminger up for two days and then send him back home."[19] Wallen, who denied being aware Emminger had signed a union authorization card or laying off the alleged discriminatee because of his support for the LIU, further testified that, at the time he laid off Emminger,[20] his intent was to recall him when work became available, and "I requested him to call me to keep checking when we would be going back to work."[21] During cross-examination, Wallen testified that the decision to lay off Emminger was a joint one by Michael Heath and himself "probably during the week before we laid him off" because "he had been working in the Sacramento area since April. It was decided that he go home; we didn't have any more work out there for Mr. Jones' crew, so we elected to send Mr. Emminger home. . . . to see his family." Asked why Emminger was selected for layoff rather than others on Jones' crew, Wallen said, "[H]e had been working more consistently than some of the others." He added that the decision was not "based on hours" but, rather, on "time away from the family . . . ." On this point, while maintaining the layoff was to afford Emminger more family time, Wallen admitted never asking Emminger about this.

Wallen further confirmed having two conversations with Emminger. He recalled one conversation in April at McKinley Park in Sacramento.[22] According to him, "[W]e had closed our Southern California operation and, in order to keep employees in Northern California, we made a company decision that all employees would be based in Northern California." As these employees only receive subsistence when working "out of the Sacramento area" and as the pay rates are different, Emminger "was informed that he was in Northern California and as an employee would be treated as such." Wallen denied saying this was because of Emminger's activities on behalf of the LIU or that he warned Emminger if he told anyone about a subsistence cut or pay cut, he would be laid off. Next, Wallen recalled a conversation with the alleged discriminatee in May subsequent to the latter's layoff. According to him, Emminger "stat[ed] that he would inform me if the had any contact with the union . . . . I said that's fine."

There is no dispute that, on a Sunday early in June, Respondent's management officials, Reed and Heath, conducted a meeting with the Company's employees in the yard of Respondent's facility in Sacramento. Present were the 11 employees, including alleged discriminates Isaacs, Henderson, McQuerry, and Settecase, on Anson Jones' slurry seal crew[23] and the employees on another crew. Reed announced to the gathered employees that Heath would like to address them, and the latter proceeded to speak for approximately 20 minutes. According to Frank Settecase, who stated the Jones' crew employees were preparing for a job in Merced, Reed's speech "seemed to be centered around Union activities." He said that "the [Laborers] wasn't any good, particularly the Local 185. And that if we did go Union, the company could drop our wages to $8 per hour and we wouldn't get uniforms, and subsistence wouldn't be included when we worked out of town." Also, Heath spoke about "safety on the freeway." Further, after having his memory refreshed with a leading question, Settecase also recalled Heath saying, "[T]hat the company would close their doors before they'd go union." Regarding Heath's warning about reducing the employees' wages, Settecase initially reaffirmed his testimony; however, when asked by Respondent's attorney if Heath said wages *may* be cut, Settecase said, "Uh-huh." Further, as to Heath's threat that Respondent would close its doors, during cross-examination, asked if Heath said the employer's *might* close its operations if the employees went to the LIU, Settecase responded, "Yes." Jimmy Isaacs also recalled Heath's comments during this meeting, stating, Heath "talked about if we . . . went union that . . . we could get a reduced pay. We could lose our uniforms. We could lose our medical. Things of that nature." During cross-examination, Isaacs was unable to remember Heath saying the employees' rates of pay would be reduced to $8 per hour. As to whether Heath warned that Respondent would have to close its doors, Isaacs testified, "It seems like he did but I cannot say one hundred percent positive." However, after being shown his pretrial affidavit in which he wrote he did not recall Heath saying Respondent would close its doors, Isaac changed his testimony, stating, "I don't remember him saying that." While failing to testify as what he did say to the employees during his speech, Heath specifically denied saying Respondent could drop its employees wages to $8 per hour if they selected the LIU as their bargain-

[19] R. Exh. 4, the work schedule for Respondent's crews from March through August, corroborates Wallen regarding the paucity of work for Jones' crew in May through mid-June.

Counsel for the General Counsel offered no evidence or contends that R. Exh. 4 was inaccurate or had been fabricated.

[20] Wallen testified that Respondent's criteria for layoff include whether the employee has either a class A or a class B driver's license. Such employees have the highest priority to be retained. Then, Respondent considers the employee's skills and job experience. Finally, Respondent will consider job tenure.

[21] Wallen admitted that, in conversations with Emminger subsequent to his layoff, he told the alleged discriminatee that he had "more than enough people" and that "that it would be mid June before Mr. Jones' crew started up again."

[22] He later changed his testimony, stating the conversation was in May.

[23] According to Frank Settecase, these included Ivan _____, Mike _____, Sam _____, Jimmy Isaacs, Martine _____, Anthony _____, Antonio _____, Eric Henderson, Patrick McQuerry, and himself.

ing representative or threatening that Respondent would close its doors before it went union.

The consolidated complaints allege that operating foreman, Anson Jones, has been, at times material herein, a supervisor within the meaning of Section 2(11) of the Act and Respondent's agent within the meaning of Section 2(13) of the Act and that, on behalf of Respondent, he engaged in several violations of Section 8(a)(1) of the Act. At the outset, I note that Respondent's slurry seal and other crews sometimes work on jobsites in excess of 100 miles from the Company's Sacramento facility and that the operating foreman is charged with the responsibility for completing the assigned job according to the production schedule.[24] Jones, who, the record reveals, is salaried and earns, at least, three times as much per quarter as any employee on his crew,[25] testified that, in his capacity as an operating foreman, he possesses no authority to hire, to fire,[26] to discipline, to permit employees to leave jobs early,[27] to give raises, or to recommend the giving of raises, to employees on his crew. Rather, "I show up at a job site and get our equipment ready to lay slurry and make sure everybody has all their stuff and get them out on the job and do the job. . . . I operate the back of the machine that makes the slurry that we put on the ground." In the latter regard, Jones works on the machine "however long it takes us to get the job done . . . ," and he will sometimes work with the job tools for "probably maybe fifteen minutes" during a day. Also, according to Jones, employees telephone him if they are going to be late for work, and he initials the employees' timesheets on a daily basis. Further, while Jones is nominally in charge of his crew, he speaks to Wallen typically "sometimes several times a day" depending upon the number of "problems that are coming up."[28] Finally, Jones testified that he will inform Wallen as to whether an employee is able to perform the required work, and Wallen confirmed this, stating that the operating foremen "don't make recommendations; they just tell me if they think . . . [employees have] what it takes to do the job."

The dispute regarding the extent of Jones' supervisory authority is concentrated upon two points—whether he responsibly directs the work of the employees on his crew and whether he is authorized to approve payment for 8 hours of work in a day for employees, who have not worked that number of hours. With regard to the assigning of work, Frank Settecase, a squeegeeman on Jones' crew, testified that Jones assigns him to a job each day and tells him to stop working one job and to start another, if necessary. However, when asked, by me, if employees know their jobs on any particular jobsite, Settecase, who testified that Jones decides which employee will work overtime if such is necessary, replied, "Yes, I would know that I was going to be squeegee." On this identical point, Jimmy Isaacs testified, "We had our assigned works. I was a driver. So I pretty much knew what I had to do. But it was Anson Jones who gave . . . the work orders on who did what." With regard to authorizing payment for 8 hours of work when, in fact, employees worked fewer hours, Jimmy Isaacs recalled working on a job in Redding for which, 1 day, Jones credited some employees for having worked 8 hours when the job was just a 4-hour job—"Everyone who drove equipment got the eight hours;" however, other employees, including squeegeemen, received pay for their exact hours worked—4 hours. Initially, Jones testified that it is "pretty much . . . company policy" to pay its employees for 8 hours of work in a day when they complete their work in less than 8 hours and that the practice covers every employee on his crew and is not restricted to any type of job. However, when asked if some employees may have received 8 hours of pay on a job in Redding when others did not, Jones replied, "Yes," because "the people who got eight hours were the Class A drivers, which when they left Sacramento and drove to Redding, did the job, and then drove back, they were on the clock from the time they left until the time they got back." Other employees don't get paid "for travel." Thus, for employees who do not possess class A licenses, "if the job is only going to take three or four hours to do, they are not going to get their eight." He added that a driver, such as Isaacs, is "on the clock from the time he left until the time he got back." Wallen confirmed that there is a company practice "that [employees] get paid if the job is good for a full day . . . the employees get paid for a full day." However, asked if there are any particular employees who are guaranteed 8 hours if they only work 4, Wallen said, "[A]ll of them," and added that, in this regard, there is no difference between a squeegeeman and a class A driver. Wallen then specifically denied that class A drivers are guaranteed 8 hours even if they just work 4 hours.

Concerning the alleged violations of Section 8(a)(1) of the Act committed by Anson Jones, alleged discriminatee Settecase testified regarding two incidents. He recounted that, after the yard meeting in early June during which Heath spoke to the assembled employees, Anson Jones and the employees on his crew worked for 2 weeks on a job in Merced and that the employees stayed together at a Motel 6 during the project.[29] One

[24] In this regard, Mike Wallen testified that he is unable to be on every job every day and relies upon the operating foreman to "continue production," and Anson Jones testified that, for jobs, he is responsible for meeting with clients or inspectors, and "they would complain to me first and then if it was something that I could fix, we would fix it then. If not . . . I would call the office and find out what to do." Also, unlike other employees, Jones is given a company credit card for the purchase of water or tools if necessary.

Wallen testified that he regularly receives input from his foremen as to whether employees are doing a "good job" or not. Also, if an "issue" arises with an employee, Jones will speak to him, and then Wallen will come to the jobsite and speak to the employee involved.

[25] Although he has never received a bonus payment, Jones believed he is eligible for bonus payments if Respondent is performing well.

Jones professed a lack of knowledge as to how much Respondent pays him for his work.

[26] Jones conceded having recommended the discharge of Eric Henderson on one occasion. However, Mike Wallen came to the jobsite, spoke to Henderson, and did not fire him.

[27] Respondent's policy on jobs is to permit employees to leave work early "if all the work is done" for the day.

[28] These problems include employee work performance and employee complaints about conditions on the job. However, according to Jones, he does not discuss these matters with management—"I say if there is a problem, and they deal with it."

[29] Contrary to Settecase, R. Exh. 4, the work schedule for Respondent's crews through August, does not show the Anson Jones crew

night in Merced, according to Settecase, Jones and the employees on his crew were all gathered "outside" one of the rooms when Jones began reiterating what Heath had said to the employees. Jones spoke "about the company and us losing our uniforms or cutting our pay to $8 an hour and closing the doors if we went union. . . . I said that I was in a union for 15 years, and I thought the benefits were good and the working conditions were good. . . . [Jones] said that it wasn't no good. And I asked him . . . why not? And he said that they had a union here before . . . and . . . it wouldn't be any good because we'd all lose . . . our medical benefits. We wouldn't get . . . subsistence and we'd get a pay cut." While admitting having a June conversation with Settecase during which "I said I didn't care for the union," Anson Jones specifically denied saying wages would be cut, benefits would be lost, and Respondent would close if the employees supported the LIU.

Settecase next testified regarding an incident in July while Anson Jones' crew was working on a job at Sacramento City College in Sacramento.[30] One afternoon, according to the alleged discriminatee, Jerry Morales and two other LIU representatives came out to the jobsite and began distributing leaflets on behalf of Laborers Local 185. After they finished and left, Anson Jones walked over to the crew's stockpile area near which his own truck was parked, approached the vehicle, "ripped [a flyer] off his . . . windshield, and said that if that asshole puts anymore shit on my windshield, I'm going to kick his ass." At this point in his testimony, asked if he remembered anything else Jones may have said, Settecase responded, "No, other than the statement, no." Then, asked if Jones said what would happen to their benefits, Settecase replied that, after his threat, Jones "just kept going. . . . He said that we'd lose everything. We'd lose uniforms, and our subsistence and our pay. He'd like to say they close the doors a lot to them. If we kept up, you know, kept up the Union activities." Finally, asked if Jones said anything about water, Settecase recalled him saying, "[T]hat we didn't work hard enough. We didn't deserve water or facilities." Asked about this incident by Respondent's counsel, Jones only specifically denied warning that employees would lose their benefits and that the Company would close if the union came in.

Settecase also testified about a conversation with Mike Wallen on a Sunday in early July at Respondent's Sacramento facility. He recalled that, as the employees, working on Anson Jones' crew, were preparing to return to Merced, alleged discriminatee McQuerry approached and said that Wallen wanted to speak to him. "I went over to see what Mike wanted," and he "showed me a folded out map of California, and . . . said that if we went union, this would be the areas where you wouldn't get subsistence." Settecase, who stated that Wallen termed the map a "union subsistence map," added that it showed a small area around Crescent City and another small area near San Diego in red. "But, the rest of it we wouldn't get subsistence." Respondent's Exhibit 5 is a map of California, published by the Associated General Contractors of California, showing, in red, areas in which subsistence is not paid to any construction industry craft employees and, in other shades, areas in which daily subsistence payments are made to the various craft employees. Mike Wallen testified that he showed this map to Respondent's employees "in a group environment" and that he showed to the employees on Anson Jones' crew in May at Respondent's facility. According to him, he told the employees "that these are some of the subsistence areas that the labor unions pay subsistence or don't pay subsistence and showed the4m the areas that we do our work and just inform[ed] them of what our subsistence rate is compared to what is on the map."

There is no dispute that Respondent twice acted with regard to daily subsistence payments to its employees in July. First, the following memorandum was sent to all the employees on its work crews:

> Due to increased costs in the Bay Area, and your request, we have decided to increase all subsistence payments to $57 per day.
>
> If we were in the Laborers Union, 98% of the areas you work in do not qualify for subsistence. If you would like to have your copy of the Laborers' subsistence map, please request one, they are available in the office.
>
> This change went into effect on July 14, 2002.

Michael Wallen, who denied that the daily subsistence payment was changed in order to induce Respondent's employees to cease supporting the LIU, stated that Respondent decided to increase the payment rate as its foremen were hearing "concerned comments" form the employees on their crews, regarding expensive lodging costs in the Bay Area; "so we actually had [a secretary] do a survey of several locations where we do jobs, find out what the rates for, and what would be commensurate for our employees." Respondent failed to offer this survey as corroboration; nor did Anson Jones or any other foreman corroborate Wallen that employees were complaining about lodging costs in the Bay Area.

Next, alleged discriminatee, Jimmy Isaacs, who lives in southern California and who is a class A licensed shuttle truckdriver for Respondent,[31] testified that his 2002 work season for Respondent began in April and that he worked exclusively in northern California, receiving $50 per day in subsistence payments "for every day that I was up in Northern California" away from home. According to Isaacs, he received the daily subsistence payments for weekends, during which he worked or was scheduled to work, and not for weekends, during which he would return home.[32] Isaacs, who denied any conversations,

working any job in Merced in June, July, or August. In fact, other than 3 days in Lafayette on July 22 through 24, the Jones crew worked almost exclusively in the Sacramento area until August 12 at which time the Jones crew was assigned to a job in Watsonville. The work schedule does reveal that Jones' crew worked on a 2-week job in Merced in mid-April; however, this was prior to Respondent becoming aware of the LIU organizing campaign and cannot be the weeks to which Settecase referred to in his testimony.

[30] R. Exh. 4 has Anson Jones' crew working in Sacramento throughout the month of July.

[31] Shuttle truckdrivers drive between stockpiles and the jobsites, emptying their loads of sealant and returning to pick up new loads.

[32] His usual schedule permitted him to be off every other weekend. He would return home on those occasions and received no subsistence.

concerning the eventual cessation of daily subsistence payments for work within the Sacramento area, with management officials prior to commencing work for Respondent in 2002, further testified that, in early July, while he was at a stockpile in the Sacramento area, he engaged in a telephone conversation with Mike Wallen. "He told me that they . . . was not going to be giving subsistence any more after this . . . . workweek was over. And I told him . . . that sucks. . . . He said it was company policy. We don't give subsistence while we're working in the Sacramento area. . . . Nobody had it, so I wouldn't be getting it. And then he told me also that I can thank Shawn for that."[33] The record reveals that, between July 3 and 19, Isaacs worked jobs for Respondent in Sacramento and that, in fact, he received no daily subsistence payments during those 16 days. According to Isaacs, not receiving subsistence pay made life "absolutely miserable" for him as he could not afford a motel room and was forced to live in his truck. He was unable to shower and, as a result, was too "dirty" to eat in public restaurants and wore dirty clothing. Isaacs testified that, at least, 2 weeks after their initial July conversation, he had a face-to-face conversation with Wallen at a service station near an off-ramp from Interstate 80 in the Sacramento area. They spoke as Isaacs was filling his truck with gasoline, and, after greeting each other, Wallen told Isaacs "that he would give me [four days of subsistence per week], but, if I told anybody anything . . . I would not get the subsistence . . . . And I told him that they should have never took the subsistence away from me. I didn't ask to come to Northern California. . . . and then Mike Wallen told me that I can thank the Union for that. Because of the Union, it had made Jeff Reed mad. . . . I finished fueling the truck . . . and went . . . and did my job." Finally, the complaint in Cases 20–CA–30721 and 20–CA–30973 alleges that, in fact, Respondent reinstated Isaacs' subsistence, albeit unlawfully, at a reduced rate.[34] In this regard, utilizing Respondent's Exhibits 4 and 6, entitled "Jimmy Isaacs Subsistence Pay 2002," it is apparent that, contrary to Mike Wallen's assertion, while he was paid subsistence for all days on which he worked on jobs more than 75 miles from Sacramento, for jobs within 75 miles of Sacramento, he was only sporadically paid daily subsistence. Thus, on July 25, 26, 29–31 and August 1 and 2, he worked in Sacramento but received subsistence pay only on July 26 and Sunday, July 28; on August 5 through 8, he worked in Sacramento but received no subsistence pay on August 5;[35] and, on August 20 through 23 and 25, while working on a job in Fairfield, a city less than 75 miles from Sacramento, he received subsistence on just 1 day—August 20.[36]

Respondent does not dispute that it ceased paying daily subsistence to Isaacs for work in the Sacramento area in July. In this regard, Michael Wallen testified that Respondent decided, sometime in May,[37] to treat its employees, who lived in southern California and had, in the past, worked for it in the southern part of the state but who were then working almost exclusively for it in northern California, in the same manner as its employees, who lived in northern California, and not pay daily subsistence to them for work within 75 miles of Sacramento.[38] Respondent's decision meant that subsistence would only be paid to all its employees for work more than 75 miles from Sacramento. In this regard, according to Wallen, in May, Respondent, established a "timeline" for treating the four southern California-based employees, including Jimmy Isaacs, who remained with Respondent after it ceased full-time operations in the southern part of the state, as northern California-based employees,[39] and he began personally[40] informing the employees of Respondent's new subsistence policy.[41] Wallen added that "I wanted to give them a minimum of thirty days prior to the cut-off date when were going to stop providing subsistence" because "I wanted to give them enough time to make decisions whether to stay with the company based on where we were going or to move north. One employee . . . moved to Sacramento; the other three are still in Southern California." Continuing, Wallen testified that, as set forth above, he informed alleged discriminatee Emminger of Respondent's decision in May, and, when asked if also spoke to alleged discriminatee Isaacs, he replied, "Yes. . . . It would have been in May when we made the decision." Wallen stated that he gave Isaacs notice of Respondent's intent; that he specifically told Isaacs that his daily subsistence for work within the Sacramento area would end in July; and that Isaacs replied, "[H]e was probably going to look for some work in Southern California. . . . he had no intention of moving up here." Wallen further testified that, during conversations between them during June, Isaacs in-

[33] As stated above, according to Isaacs, prior to Wallen's announcement, unlike those employees who lived within the Sacramento area, all southern California employees received daily subsistence payments for their working days within 75 miles of Sacramento and outside the 75-mile area. He believed there were five such employees, who continued to live in southern California. Isaacs intimated that his were the only daily subsistence payments for southern California residents, which were suspended. He named another employee, Mario Trejo, as continuing to receive subsistence. However, during cross-examination, Isaacs conceded that Trejo may have been working in the San Francisco Bay Area in July and, thus, would have normally been receiving a daily subsistence payment.

[34] If the General Counsel means that Respondent paid daily subsistence to Isaacs for work in Sacramento but at a rate less than before July 2, there is no record evidence to support such an allegation.

[35] Isaacs worked on a job in Watsonville, which began on August 12. Presumably, he would have been required to remain in Sacramento in order to prepare for that job. However, Respondent failed to pay him subsistence on Friday, August 9, or for the weekend of August 10 and 11.

[36] Isaacs testified that he received subsistence payments for most of September but that "a lot of it was because we were away from [Sacramento]." He also testified that, as Respondent paid for a motel room for him during October, he received no daily subsistence payments.

[37] During cross-examination, he stated that "conversations began in April after we started our new season."

[38] According to Wallen, Respondent considered daily subsistence payments for work in the Sacramento area to be "inappropriate."

[39] As stated above, in order to retain these employees, in 2001, Respondent had made daily subsistence payments to them even for work within the Sacramento area.

[40] Wallen admitted not retaining any records of these conversations. Asked why no companywide memorandum was published, Wallen averred that he prefers dealing with employees "individually."

[41] These conversations were all within "the same week."

formed him that, without subsistence, he (Isaacs) would be forced to live out of his truck. Therefore, notwithstanding he was working a job in Sacramento in the first week of July, "because of his Class A license and his continued disapproval of cutting off his subsistence. . . . and I didn't want him starving or living in his truck, we made arrangements to filter in subsistence to help him out."[42] In this regard, "I think [I] informed him that he would be receiving the July 1 and July 3 and then he was going to be cut off." During the next 2 weeks, Isaacs worked a Sacramento job and was not paid any subsistence. According to Wallen, during those 2 weeks, Isaacs "was very boisterous about not being able to receive a subsistence" and complained "that we were affecting his life, starving his family, starving him, forcing him to live in a vehicle, not being able to shower, bathe, eat," and, while he was aware that Isaacs was, in fact, living in his car, not showering, and generally living in a squalid and feculent manner, Wallen averred that "the shock was that he didn't make other arrangements."[43] Continuing, Wallen testified that, as Isaacs was scheduled to start a job outside the Sacramento area, for which he would receive daily subsistence pay, on July 22, Isaacs was paid subsistence for the weekend of July 20 and 21. Eventually, according to Wallen, "[B]ecause Jimmy was a valued employee" and "I didn't want any of my workers living in a car," Respondent resumed paying daily subsistence to Isaacs while he worked in Sacramento. Finally, Wallen specifically denied telling Isaacs he could blame the cessation of his daily subsistence payments in Sacramento on Emminger, reinstating Isaacs' subsistence during the first week of August at a reduced rate, or threatening to eliminate the resumed subsistence payments if Isaacs told other employees and generally denied telling employees that their subsistence pay had been eliminated because of Laborers Local 185.

In August, Isaacs and the employees on Anson Jones' crew were assigned to work on a job in Watsonville, a location in excess of 100 miles from Sacramento. Frank Settecase,[44] who executed an authorization card for Laborers Local 185, given to him by alleged discriminatee Emminger "just after" the day of the Christmas party, testified that, during the second week of the job, an LIU official visited the jobsite one day, and he distributed flyers and invited the employees to a meeting at a local pizza restaurant that night. Later in the day, Mike Wallen visited the job, and "I think . . . he invited us to dinner, but we told him we were going to have pizza with some [LIU] officials."[45] According to Settecase, "[M]ost of us . . . . I can't say all of us," attended the meeting with the LIU agents, and he identified alleged discriminates, Patrick McQuerry and Eric Henderson, and two others as being at the pizza restaurant with him. Settecase further testified that, the next day, a photograph was taken of Henderson, Antonio _____, and him while at work on the jobsite in Watsonville. The photograph (GC Exh. 3) which appeared in a newspaper, the Watsonville Register-Pajaronian, on Saturday, August 17, showed Settecase wearing a Laborers Local 185 logo shirt over his work shirt. The alleged discriminatee added that he "had worn [the shirt] before" while working and that other employees, including McQuerry, also had worn Laborers Local 185 logo shirts at work. There is no record evidence that any management representative or Anson Jones ever saw the August 17 photograph.

Settecase next testified that, the following week, the employees on Jones' crew were working on a job in Napa and that, on Thursday, he had a conversation with Mike Wallen. The latter informed the alleged discriminatee "that I was laid off effective immediately. . . . on a rotating basis. Every two weeks . . . . I would be laid off and then brought back and then laid off and brought back."[46] Settecase added that Wallen also laid off Eric Henderson and Patrick McQuerry that day. According to Settecase, notwithstanding what Wallen told him, Respondent did not recall him to work until the end of September,[47] and he was again assigned to Anson Jones' crew. Henderson and McQuerry were recalled and returned to work on or about September 24; however, rather than being assigned to squeegee work, each was assigned to fill the "sand hopper," work which the employees considered unpleasant.[48] In this regard, Jones told Settecase "that I wouldn't be performing squeegee work any more."[49]

Jimmy Isaacs testified concerning two alleged comments by Anson Jones, suggesting Respondent was unlawfully motivated in laying off Settecase, Henderson, and McQuerry, while his crew was working on a job[50] in Concord, located approximately 60 miles from Sacramento, at the end of August. In this regard, I initially note that, according to Respondent's work schedule for the month of August, none of its crews worked jobs in Concord in August and that, while a crew did work in Walnut Creek, a neighboring city, it was not Anson Jones' crew. In any event, according to Isaacs, one day on the job, while sev-

[42] According to Wallen, daily subsistence to employee, Mario Trejo, for work in Sacramento was stopped on July 1 and not resumed as he made arrangements to stay with other crewmembers in Sacramento.

[43] Respondent offered no evidence with regard to its other employees, who continued to live in southern California. Thus, there is no evidence that Respondent treated the individuals in the same manner in which it treated Isaacs—stopping subsistence payments for work in the Sacramento area. In this regard, I note that Wallen conceded not issuing an employee memorandum, regarding the change in practice.

[44] Along with other employees, Settecase attended the late Christmas party at the Rusty Duck restaurant in Sacramento. According to him, prior to the start of the party, he spoke to Mike Wallen "outside" the restaurant, and Wallen told him there were "[u]nion officials" downstairs. Wallen did not identify the union to which he referred, and Settecase replied, "[T]hat I belonged to the [IAM] for 15 years, I'd like to talk to them."

[45] Wallen failed to deny this aspect of Settecase's testimony.

[46] Settecase alleged that, at the time of his layoff, "all but one squeegeeman had less seniority than him." In this regard, a review of GC Exh. 6 discloses that, in fact, at least four of Respondent's squeegeemen had more seniority than Settecase but that, at least eight squeegeemen with less seniority than him, were not laid off.

[47] The record establishes that he returned to work on September 30.

[48] Jimmy Isaacs described this as "physically hard labor" as employees are required to unload 100 pound bags, filled with sand, from a company truck.

[49] The propriety of Respondent's recalls of Settecase, Henderson, and McQuerry is not an issue raised by the instant consolidated complaints.

[50] "We were doing patchwork where they had put cable . . . down the . . . side of the streets . . . ."

eral employees, including him, were either setting up the stockpile or putting everything away a the end of the workday, Jones and employee Sam Frye were talking about the three alleged discriminates, and "Anson Jones told Sam Frye that [Respondent] . . . got rid of the problem" with their layoffs. Also, Isaacs testified, while on the same project, one night after work, the employees on the crew were "hanging out" at their motel with an individual named Scott _____, who was employed by the street sweeping company utilized by Respondent on its projects. Scott mentioned "something" about the laid-off employees, and Jones said, "[T]hat [R]espondent got rid of their troublemakers." On another occasion at the end of September, Isaacs further testified, he was working with Anson Jones crew on a job in Woodland, and members of the crew, including Anson Jones, were having a conversation with Skip Peppes, an operating foreman for Respondent on its chip sealing crew, and an employee known as "Chicken." During the conversation, someone mentioned that Respondent had recalled Settecase, Henderson, and McQuerry back to work. "Chicken" opined that he could not believe it and asked why they had been recalled. Peppes replied that "the Union got four lawsuits on [Respondent], and [it] is going to prove the Union wrong by bringing those guys back." According to Isaacs, Jones did not controvert Peppes. Anson Jones specifically denied making the comments, attributed to him by Isaacs.

Respondent's defense to the allegations that it terminated alleged discriminates Settecase, Henderson, and McQuerry in violation of Section 8(a)(1) and (3) of the Act is economic in nature. Thus, Jeffrey Reed, Respondent's president, did not dispute that Respondent effectuated a layoff of its employees in August 2002. In this regard, Reed testified that "we generally overstaff our slurry seal crews in order to get and keep qualified people for the season. If we don't get them by June, they will go somewhere else to go to work for the season." In 2002, based upon prior work experience, "in June and July, we were overstaffing our crews . . . in the anticipation that we would go to a fourth crew." He further testified, however, that, in 2001, 25 percent of Respondent's work was for the California Department of Transportation (CalTrans),[51] that during the early summer of 2002, the California legislature "was hung up" in its budget process, and that "no money was being set aside for transportation projects to bid. . . . This went into . . . . late September when the State budget was passed . . . ." In these circumstances, "CalTrans virtually eliminated any slurry seal bidding [in 2002]." Thus, with no funds, "there were no projects with CalTrans that we were able to bid on . . . or do the work during the season," and, as a result, "both July and August had substantial drops" in revenue as compared to the same time period in 2001. Also, according to Reed, during 2002, Respondent failed in bids for substantial city and county jobs in Santa Barbara and Salinas. Based upon the foregoing, Reed testified, "by the time we got to mid-August," because no State budget had been passed, which would have funded CalTrans, "and we missed these large projects that we were anticipating getting, it was sort of death mill [sic] to try to see how we could fire up a fourth crew and keep the crews in the over-staffed position that they were." Accordingly, management, including Wallen and him, decided "that we had to cut back." Elaborating upon the asserted economic necessity for layoffs,[52] Reed asserted that Respondent, which had gross revenues of "just under twenty million dollars" during its fiscal year March 2001 through February 2002, had gross revenues of "11.2 million dollars which is approximately a seventy-six percent drop in volume," during its March 2002 through February 2003 fiscal year and that its volume of business in August was "1.6 million"—a significant decrease from "3.7 million" in the prior year. However, Respondent failed to offer any financial or other documentary evidence as support for or corroboration of the testimony of Reed. In this regard, I note that, while Respondent did offer the work schedules for its crews through the end of August,[53] it failed to offer any evidence regarding the work for its crews in September or October.

Mike Wallen testified that he was involved in the decisions to lay off Settecase, Henderson, and McQuerry and that each was laid off for the "same reason. . . . Lack of work was the primary reason." According to Wallen, who denied that the layoffs were unlawfully motivated, he spoke to each, informing him of his layoff, and he had the "same" conversation with each employee. Thus, he told Henderson "that we had lost a couple of big bids that we were hoping to get, and with the overstaffing that we carried through most of the season, we were at a point where we had to make some changes. They could expect a two-week layoff, and we would review it again at the end of that period and to stay in contact with me weekly." Wallen added that he utilized Respondent's normal criteria for layoffs, class A licenses, skills, and experience,[54] and tenure, for the three alleged discriminatees and that none had class A licenses. Notwithstanding that, according to General Counsel's Exhibit 6, squeegeemen with less seniority than Settecase and Henderson were retained and employees with less seniority

[51] Reed testified that "Anson Jones' crew is our CalTrans crew; it is the crew that does CalTrans work for us."

[52] As to the magnitude of the layoffs, Reed testified that "through the period of July, August, and September, there were a number of people that were laid off . . . each of the crews . . . and during the last week of August, I believe there were six, seven, or eight people that were laid off." Asked for the classifications of laid-off employees, Reed stated that the layoffs were in the "overstaffed classifications," including squeegeemen and traffic control employees. He added that class A licensed drivers were "protected" as they have a "golden ticket" for remaining employed. The only record evidence of termination dates is GC Exh. 6, and, according to it, besides the three alleged discriminatees, two of whom were squeegeemen, five employees were laid off in June, two were laid off in July, two other employees were terminated in September, and one employee was laid off in October.

[53] R. Exh. 4, the paving crews' work schedules, ends in August, and discloses that Anson Jones' slurry seal crew worked steadily that month.

[54] In a position statement to Region 20, dated October 2, 2002, Respondent's attorney asserted that Settecase, Henderson, and McQuerry had the least seniority among Respondent's squeegeemen. However, a review of GC Exh. 6 discloses that, of the 13 squeegeemen remaining on Respondent's payroll, 8 had lower seniority than Settecase and 3 had lower seniority than Henderson.

than McQuerry were retained,[55] asked to explain why he laid off more senior rather than less senior employees, Wallen replied, "I don't believe I did." Asked if he even investigated seniority, Wallen responded, "Sure. . . . I looked at their experience, how many years that they had been in the trade." Specifically asked what he did to check, Wallen said, "I have been around my crew, I know how long they have been around, and I know their work ethics. To check specific dates of one day of extra work is more prevailing in decision-making, no." Eventually, Wallen testified, in the first or second week of September, he offered recall to a seal coat team to Henderson, but the latter said, "[H]e didn't like working with the seal coat crew." Also, at some point in early September, "I spoke to [Settecase], offered him to come back and do some work. His response was that . . . he was watching his girlfriend's kids, and they had some doctor's appointments and wouldn't be able to make it . . . and would get back to me."[56] Asked if he sent letters to either Henderson or Settecase, Wallen said he never sends letters as "usually if I need people its on a spur of the moment basis; if I find out that a crew is short, then I try to find replacements."

B. Legal Analysis

As set forth above, the consolidated complaints allege that Respondent engaged in various acts and conduct, violative of Section 8(a)(1) and (3) of the Act. With regard to the alleged 8(a)(1) violations, I initially turn to the acts and conduct, attributed to Mike Wallen, Respondent's project superintendent, and note that two allegedly unlawful conversations occurred between Wallen and John Michael Shawn Emminger. With regard to these, while Emminger's demeanor, while testifying, was not that of an inherently dishonest witness, manifested by his testimony regarding Respondent's Exhibit 1 and regarding his use of the company vehicle for trips home, he exhibited scant reluctance to fabricate testimony in his own self-interest. However, in contrast, Wallen's demeanor, while testifying, was that of an utterly disingenuous witness, and, between Emminger and him, I believe the former was the more forthright witness.[57] Therefore, crediting Emminger, I find that, in early May, during a conversation at a Sacramento park, Wallen informed the alleged discriminatee that his wage rate had been reduced from $17 to $15 per hour, that his subsistence pay would be reduced as he would no longer be given subsistence pay for weekends in which he was not scheduled to work, and that Respondent would provide a vehicle for him for transportation to and from work on nonwork weekends. However, noting that his stepfather, Jimmy Isaacs, corroborated only this portion of Emminger's testimony, I do not believe the alleged discriminatee's assertion that Wallen also threatened to lay him off if Emminger informed other employees regarding what the former told him. Accordingly, I shall recommend that paragraph 6(a) of the complaint in Cases 20–CA-30721–1 and 20–CA–30973 be dismissed. Again crediting Emminger, I find that, on the day of his eventual layoff, while driving to a jobsite, the alleged discriminatee spoke to Wallen by telephone and that, after informing Emminger only foremen were allowed to use company vehicles for nonwork purposes, Wallen asked Emminger, "[I]f I had contacted the Union or had they contacted me."[58] The General Counsel alleges that the foregoing constituted an act of unlawful, coercive interrogation. As to whether Wallen's questioning of Emminger was unlawful, the test is "whether under all the circumstances the interrogation reasonably tend[ed] to restrain, coerce, or interfere with rights guaranteed by the Act." *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). While, at the time of the above conversation, Respondent was aware of the LIU's organizing campaign amongst its employees, there is no record evidence that Wallen was aware of Emminger's role in it, that the latter had, in any manner, publicized his role as a union adherent, or that the two had ever discussed the LIU. Further, there is no evidence that Wallen and Emminger had anything but a supervisor-employee relationship, and Wallen asked his question shortly after unlawfully warning Emminger regarding the adverse consequences which would result from his disclosure of his personal use of a company vehicle during nonwork weekends. In these circumstances, as there does not appear to have been any lawful reason for Respondent's project superintendent's question, I find Wallen's interrogation of Emminger to have been coercive and violative of Section 8(a)(1) of the Act. *Grouse Mountain Lodge*, 333 NLRB 1322, 1328 (2001).

Next, it is alleged that Wallen's conversation with Frank Settecase with regard to Respondent's Exhibit 5, a document published by the Associated General Contractors of California, depicting areas in which subsistence is paid to employees, who are working in the various construction crafts, including laborers, and others in which subsistence is not paid to the employees, was violative of Section 8(a)(1) of the Act. While noting a significant contradiction in Settecase's testimony regarding Michael Heath's speech to Respondent's employees in early June and the meretricious and contrived nature of his testimony regarding incidents Merced in June and at Sacramento City College in July, in contrast to the mendacious Wallen, Settecase appeared to be the more palatable witness. Therefore, I find that, in early July at Respondent's Sacramento facility, Wallen spoke to Settecase, showed him the above-described map of California, and "said that if we went union, this would be the areas where you wouldn't get subsistence" pay. The Supreme Court has held that, when an employer makes a prediction as to the effect he believes unionization will have upon his company and its employees, such as that of Wallen, the prediction "must be carefully phrased on the basis of objective facts to convey an

[55] It is not entirely clear what McQuerry's job classification was; however, he is listed as "seal coat." At least, four squeegeemen, two traffic contol employees, and two seal coat employees had less seniority than him and were retained in August.

[56] Counsel for Respondent, in his above-noted position statement, wrote that Wallen did not offer recall to Settecase until September 25 and that, on September 26, the latter refused the offer, citing eye appointments for his girlfriend's children as the reason.

[57] I shall give credence to Wallen's testimony only when corroborated by other evidence.

[58] In its factual context, Wallen's version of this conversation defied belief.

employer's belief as to demonstrably probable consequences beyond his control." *NLRB v Gissel Packing Co.*, 395 U.S. 575, 618 (1969). However, while the Associated General Contractors of California's map is undoubtedly accurate in depicting the areas, in which subsistence is not paid to laborers, the document was not sufficient to constitute objective evidence to support Wallen's prediction that employees would suffer adverse consequences if they selected the Laborers Local 185 as their bargaining representative. Thus, even assuming the agreement, between Associated General Contractors of California and the LIU established the subsistence zones, which are depicted in the map, there exists no record evidence to suggest that the LIU requires all employers to accept the identical collective-bargaining agreement or that, following negotiations, Respondent's employees would not be covered by a distinct collective-bargaining agreement, one which retained Respondent's existing subsistence pay practice. *Schaumburg Hyundai*, 318 NLRB 449, 450 (1995); *Debber Electric*, 313 NLRB 1094, 1097 (1994). Put another way, *Gissel Packing*, supra, does not sanction predictions based upon such an unproven or dubious premise as Respondent's herein. In these circumstances, rather than a permissible prediction, I believe Wallen's comment constituted a threat of more onerous working conditions if employees selected Laborers Local 185 as their bargaining representative, and, therefore, was violative of Section 8(a)(1) of the Act.

Finally, turning to Jimmy Isaacs' testimony with regard a conversation between himself and Wallen at a gas station near an off ramp from Interstate 80 in Sacramento, Isaacs' demeanor was not particularly impressive, and I believe he may well have fabricated portions of his testimony. However, as between the guileful Wallen and the alleged discriminatee, I found Isaacs to have been the more credible witness.[59] Accordingly, I credit Isaacs that Wallen said, "[T]hat he would give me [4 days of subsistence per week] but, if I told anybody anything . . . . I would not get the subsistence . . . . And I told him that they should have never took the subsistence away from me. I didn't ask to come to Northern California. . . . and then Mike Wallen told me that I can thank the Union for that. Because of the Union, it had made Jeff Reed mad." As to Wallen's warning that, if Isaacs mentioned Wallen's offer to other employees, he would lose his subsistence pay for work within Sacramento, the Board has held that Section 7 of the Act, which grants to employees the "unfettered" right to engage in concerted activities for their mutual aid and protection, encompasses discussions, amongst employees about their salaries and other compensation for work—an inherently concerted activity. *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992); *Triana Industries*, 245 NLRB 1258, 1258 (1979). It follows that restrictions upon employees from communicating with each other concerning their wages, compensation, or other terms and conditions of employment are "plain and obvious" violations of Section 8(a)(1) of the Act. *Hilton's Environmental, Inc.*, 320 NLRB 437, 454 (1995). In my view, Section 7 of the Act clearly protected Isaacs' right to discuss his compensation, including subsistence pay arrangements, with his fellow employees, and Wallen's prohibition of such discussions "inhibit[ed]" employees in the exercise of said Section 7 right in violation of Section 8(a)(1) of the Act. Moreover, while counsel for Respondent points out that there is no record evidence that Wallen's warning was related to Isaacs' union activities, the Board has held that such linkage is "irrelevant;" for the Section 7 right to engage in concerted activities exists independent of union activities and, in any event, such discussions may well be a "precursor" to seeking representation by a labor organization. *Automatic Screw Products Co.*, supra; *Triana Industries*, supra. Thus, I find that Wallen's warning to Isaacs was violative of Section 8(a)(1) of the Act. Id. As to Wallen's comment that Jeff Reed authorized the elimination of subsistence payments to him for work in the Sacramento area because of Respondent's employees' support for the LIU, the Board has long held that, informing employees that an adverse employment action resulted from their support for a labor organization, is inherently coercive and unlawful. *Jefferson Smurfit Corp.*, 325 NLRB 280, 300 (1998); *Hillhaven Rehabilitation Center*, 325 NLRB 202, 213 (1997). Accordingly, I find that this comment, by Wallen, likewise violated Section 8(a)(1) of the Act. Id.

The consolidated complaints allege that, in early June, Michael Heath made statements, violative of Section 8(a)(1) of the Act. As stated above, there is no dispute that, on a Sunday in early June, after being introduced by Jeffrey Reed, Heath did address a group of Respondent's employees, including those in Anson Jones' slurry seal crew, at Respondent's facility in Sacramento. Other than offering two specific denials, Heath failed to testify as to what he did say to the listening employees. In these circumstances, the only complete accounts, in the record, of his speech are found in the respective testimony of Frank Settecase and Jimmy Isaacs, and, while neither was a particularly veracious witness, Heath failed to deny several of the alleged statements, attributed to him. Accordingly, with one exception, I shall rely upon Settecase's and Isaacs' mostly corroborative versions of what Heath said. Therefore, I find that, during his speech, Heath began by denigrating Laborers Local 185 and warned that, if the employees selected the labor organization as their bargaining representative, their wage rates could be reduced,[60] they would no longer receive uniforms and medical insurance, and they would no longer receive subsistence pay for work outside of Sacramento. However, crediting Heath's specific denial, I do not believe he ever warned that the company would close its doors before it would go union. In this regard, after testifying, during direct examination, that Heath warned that Respondent would close its doors, during cross-examination, Settecase changed his testimony, saying Heath said Respondent "might" close its doors, and, after

[59] Contrary to counsel for Respondent, I do not believe Isaacs was impeached with regard to his lack of recollection as to the wording on R. Exhs. 2(a) and (b). If anything, counsel refreshed his recollection. However, assuming Isaacs had been impeached, he appeared to be decidedly more candid than the deceitful Wallen.

[60] I specifically credit Isaacs in this regard. Heath specifically denied warning the Company could reduce the employees wages to $8 per hour if they selected Laborers Local 185 as their bargaining representative; Settecase was contradictory as to whether Heath said Respondent "could" or "may" reduce the employees wages, and Isaacs was unable to remember Heath specifying a wage rate reduction to $8 per hour.

equivocatedly attributing such a warning to Heath, when confronted by his contrary pretrial affidavit, Isaacs changed his testimony, stating he did not recall Heath stating such a warning.[61] The Board has, of course, long held that an employer violates Section 8(a)(1) of the Act by threatening employees with adverse consequences, including reduced wages, if they select a union as their bargaining representative. *Flamingo Hilton-Laughlin*, 324 NLRB 72, 111 (1997); *HarperCollins Publishers, Inc.*, 317 NLRB 168, 179 (1995), affd. in part 79 F.3d 1324 (2d Cir. 1996). Further, contrary to Respondent, there is no record evidence that Heath based his statements upon objective facts so as to constitute lawful predictions, rather than the blatant threats, pursuant to *NLRB v. Gissel Packing Co.*, supra at 618–619. Accordingly, I find that Heath's warnings were violative of Section 8(a)(1) of the Act.

The consolidated complaints assert that Anson Jones was Respondent's supervisor within the meaning of Section 2(11) of the Act and its agent within the meaning of Section 2(13) of the Act and attribute several statements, allegedly violative of Section 8(a)(1) of the Act, to him. With regard to his alleged status as a statutory supervisor, I note, at the outset, that the burden of establishing an individual is a supervisor within the meaning of Section 2(11) of the Act rests on the party—in this instance, the General Counsel—who asserts supervisory status (*NLRB v. Kentucky River Community Care*, 532 U. S. 706, 713 (2001); *Hausner Hard-Chrome of Kentucky, Inc.*, 326 NLRB 426 (1998)), and that "any lack of evidence in the record is construed against the party asserting supervisory status." *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999). Section 2(11) defines a supervisor as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust grievances, or to effectively recommend such actions, if in connection with the foregoing the exercise of such authority is not of a routine or clerical nature but requires the exercise of independent judgment.

The statutory indicia quoted above are to be read in the disjunctive; as stated by the Board in *Great American Products*, 312 NLRB 962, 962 (1993), "an individual may be deemed a supervisor within the meaning of [the above provision] if it is shown that he or she possesses the authority to engage in any one or more of the functions enumerated there and uses independent judgment in exercising such authority." With regard to the latter point, "the Board finds judgment the use of which requires that it be exercised beyond that involved in regular or customary activities and which is not controlled or significantly constrained by outside sources to be independent judgment under Section 2(11)." *Training School at Vineland*, 332 NLRB 1412, 1413 (2000). Further, an individual, who is alleged to be a supervisor, must exercise his or her authority in the interests of the employer, and "performance of those functions in a merely routine, clerical, perfunctory, or sporadic manner will not suffice." *Nursing Center at Vineland*, 318 NLRB 901, 904 (1995); *Great American Products*, supra. By the foregoing, Congress meant to ensure that only individuals, who are vested with "'genuine management prerogatives'" are included within the definition, and "the Board must judge that the record proves that an alleged supervisor's role was other than routine communication of instructions between management and employees without the exercise of any significant discretion." *Great American Products*, supra; *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992). Moreover, while an employer ostensibly may grant supervisory authority to individuals, statutory supervisory status requires the existence of "actual authority," and "mere paper authority does not confer supervisory status." *F. A. Bartlett Tree Expert Co.*, 325 NLRB 243 at fn. 1 (1997). Also, absent evidence that individuals possess any of the enumerated indicia of supervisory status in Section 2(11), "there is no reason to consider so-called secondary indicia, such as their titles, the employee-supervisor ratio . . . or pay differentials between them and others in their departments." *Training School at Vineland*, supra at fn. 3; *Housner Hard-Chrome of Kentucky, Inc.*, 326 NLRB 426, 427 (1998). Finally, the Board has a duty not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996); *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981).

There is no dispute, and counsel for the General Counsel does not contend, that, in his capacity as an operator/foremen for Respondent, Anson Jones possesses any authority, in the interest of Respondent, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or to discipline other employees or to effectively recommend such personnel actions. There is also no dispute that, on a daily basis, when on a Sacramento area or remote jobsite, Jones' job duties consist of "show[ing] up on a jobsite and get[ting] our equipment ready to lay slurry and mak[ing] sure everybody has all of their stuff and get[ting] them out on the job and do[ing] the job" and that Jones spends his entire work day operating a slurry seal machine until all necessary slurry has been produced and laid on the ground and working with the job tools when necessary. Also, it is undisputed that Jones is in telephone contact with Mike Wallen several times a day and that the latter is directly involved in all personnel actions, enumerated in Section 2(11) of the Act. While the record discloses that Jones is salaried, earns substantially more than any other employee on his crew, and initials the employees' timecards—all secondary indicia of supervisory authority, counsel for the General Counsel concentrates upon what she perceives as Jones' authority to responsibly direct the work of the employees on his crew as establishing his status as a statutory supervisor. In support, noting that Respondent's jobsites stretch from the northern-most areas of California to areas in southern California and it is not possible for Mike Wallen to personally be at every jobsite every day, that foremen are responsible for ensuring jobs are completed in a timely manner and performed properly, that foremen must deal with clients, and that Wallen relies upon the foremen to report to him as to the job performance of the employees on his

[61] Therefore, I shall recommend dismissal of par. 8(b) of the consolidated complaint in Cases 20–CA–30721–3, 20–CA–30721–4, and 20–CA–30721–5.

crew, counsel argues that a conclusion Jones is not a supervisor within the meaning of the Act "would require a finding that Respondent permits large paving contracts far from headquarters to occur autonomously and without accountability to clients or direct supervision of the crews performing the work." However, contrary to counsel, I need not make such a finding; for, while he nominally assigns crew members to the various jobs, the test for supervisorial status is only whether Jones uses independent judgment in doing so. On this point, when asked if employees knew their jobs at any given jobsite, Frank Settecase admitted, "Yes, I would know that I was going to be squeegee" and Jimmy Isaacs admitted, "We had our assigned works. I was a driver. So I pretty much knew what I had to do." Further, besides the repetitive nature of the jobs, given the scene, depicted in the August 17 newspaper photograph, of the Anson Jones crew employees at work in Watsonville, it appears that job assignments are of a routine nature and do not require consideration of the employees' expertise and skill in performing technically demanding tasks. Moreover, adopting counsel's arguments would alter the meaning of "independent judgment" to include distance and management oversight limitations; to do so is the prerogative of the Board and not of an administrative law judge. For the foregoing reasons and, inasmuch as there is no evidence he exercises any authority beyond routine directions of simple tasks, I do not believe that Anson Jones should be categorized as a supervisor, within the meaning of Section 2(11) of the Act,[62] for Respondent. *Willamette Industries*, 336 NLRB 743, 744 (2001).

While counsel for the General Counsel neglected to address the issue in her posthearing brief, the consolidated complaints allege that, besides being a statutory supervisor, Jones also was an agent for Respondent within the meaning of Section 2(13) of the Act. In these circumstances, I am compelled to address the issue. In several decisions, while concluding that individuals were not supervisors within the meaning of Section 2(11) of the Act, the Board has applied common law agency principles in order to determine whether such individuals were agents of their employers, within the meaning of Section 2(13) of the Act, in the course of making particular statements or taking particular actions. *Cooper Industries*, 328 NLRB 145 (1999); *Hausner Hard-Chrome of Kentucky, Inc.,* supra at 428; *Southern Bag Corp.*, 315 NLRB 725 (1994); *Great American Products*, 312 NLRB 962, 963 (1993). One such principle is apparent authority, which "results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question." Id. The Board has long held that, under this doctrine, the test for determining whether an asserted supervisory employee is an agent of the employer is whether, under all the circumstances, "the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425, 426 (1987) (citations omitted). In this regard, as stated in Section 2(13), when making the agency determination, "the question of whether the specific acts performed were actually authorized or subsequently ratified should not be controlling." *Great American Products*, supra. Further, under Board precedent, an employer may have an employee's statements attributed to it if the employee is "held out as a conduit for transmitting information [from management] to other employees." *Hausner Hard-Chrome of Kentucky, Inc.*, supra; *Debber Electric*, 313 NLRB 1094, 1095 fn. 6 (1994); *Great American Products*, supra. In the latter regard, although not dispositive, the Board will consider whether the statements or actions of the asserted agent were consistent with statements or actions of the employer. *Pan-Osten Co.*, 336 NLRB 305, 306 (2001).

It was counsel for the General Counsel's burden[63] to establish that Respondent acted in such a manner that its employees could reasonably have believed Anson Jones spoke on behalf of management if he made the specific statements, which are alleged as unlawful and attributed to him, and I believe that there is sufficient record evidence, demonstrating the existence of such an agency relationship. In this regard, I note that Anson Jones' slurry seal crew often works on jobs located in excess of a hundred miles from Respondent's Sacramento facility; that, as Wallen is unable to be on every jobsite every day, Jones is clearly Respondent's representative on the jobsites, charged with the responsibility for completing the assigned jobs in accord with the production schedule and meeting with clients and inspectors in order to resolve any work problems or disputes; that, unlike other employees, Respondent has authorized Jones to use a company credit card for purchasing necessary goods and equipment; and that Jones initials employees' timecards and is the individual whom employees telephone when they will be late reporting to work. Further, while the employees' job functions may be routine and repetitive, Jones assigns the jobs, moves employees from one job to another, and, presumably, informs employees of the amount and type of work to be done each day, and, while there is no specific record evidence that Jones regularly meets with the employees on his crew to convey information and decisions pertaining to their jobs and working conditions, as in *D&F Industries*, 339 NLRB No. 73, slip op. 2–3 (2003), Jones regularly reports to Mike Wallen, regarding whether the employees on his crew are capable of performing their required job tasks and regarding employees' complaints about their working conditions, and administers Respondent's policies regarding permitting employees to leave work early and crediting employees for 8 hours of work when a job requires fewer hours to complete. In these circumstances, I believe there is sufficient record evidence to warrant the inference that, if Jones made the alleged comments, which are attributed to him, the employees on his crew could reasonably believe he was speaking on behalf of management and reflect-

[62] I have considered the issue as to whether Jones was authorized to credit Jimmy Isaacs for working 8 hours on a job in Redding, California when the job was just a 4-hour job and note that Jones was uncontroverted that he credited Isaacs for 8 hours because class A drivers, such as Isaacs, are on the clock from the time they leave Sacramento until they return and not merely for the time actually on a particular jobsite.

[63] *Pen-Osten Co.*, supra.

ing its policy with regard to their representation by the LIU. *D&F Industries, Inc.*, supra;[64] *Great American Products,* supra.

With regard to the alleged statements, which Frank Settecase attribute to him, notwithstanding that Jones appeared to be testifying palteringly and in a manner obsequious to Respondent's interests, other than regarding one statement, which the latter failed to deny, I did not believe the alleged discriminatee's accounts of a June incident in Merced or the July incident at Sacramento City College. As to the former, according to Respondent's Exhibit 4, the work schedule for Respondent's paving crews for March through the end of August, and contrary to the testimony of Settecase, Anson Jones' slurry seal crew did not work on any jobs in Merced during June, July, or August, and there is no record evidence that the document is inaccurate or feigned. Moreover, while Settecase testified that Jones uttered his asserted comments in a motel corridor, as the Jones crew worked almost exclusively within the Sacramento area, it does not seem likely that the employees on Jones' crew stayed together at a Sacramento-area motel for such work. In these circumstances, the alleged discriminatee's uncorroborated account of a conversation in a Merced motel hallway appears to be rather dubious, and I credit Jones' denial of the statements, which Settecase attributed to him during the alleged Merced incident in June. As to the second incident, Jones failed to deny, and I find, that, in July Jones' crew was working on a job at Sacramento City College; that, one afternoon, LIU agents, who had been leafleting at the jobsite, placed a flyer underneath a windshield wiper of Jones' pickup truck; that Jones "ripped" the flyer off of his windshield and, in the presence of the employees on his crew, "said that if that asshole puts any more shit on my windshield, I'm going to kick his ass." However, I do not believe the remainder of Settecase's testimony regarding further comments, which he attributed to Jones on this occasion. What Jones allegedly said involved potential unfair labor practices, and, after initially answering "no" when asked if he recalled Jones saying anything else, the alleged discriminatee was able to recount Jones' asserted additional comments only upon prompting by leading questions, asked by counsel for the General Counsel. Given the significance of such testimony and my doubts as to his candor, I am unable to credit what I consider to be dubitable testimony by Settecase. The Board has held that threats of physical violence against union agents, which are uttered by an employer's representative in the presence of his employees, constitute unlawful, coercive conduct, and I believe Jones' threat against the union handbillers, in the presence of members of his slurry seal crew, constituted conduct violative of Section 8(a)(1) of the Act. *Dayton Hudson Corp.*, 316 NLRB 477, 483 (1995); *Circuit-Wise, Inc.*, 309 NLRB 905, 910 (1992).[65]

As to the final alleged violation of Section 8(a)(1) of the Act, Respondent does not dispute that, effective July 14, it raised the amount of daily subsistence pay for its employees, who were working in excess of 75 miles from Sacramento, from $50 to $57.[66] I note that, in its memorandum announcing the increase, Respondent asserted that subsistence would not be paid in "99%" of the areas outlined in the Associated General Contractors subsistence map. Moreover, Respondent's underlying rationale for its act is best explained by Mike Wallen's comment to Jimmy Isaacs regarding Respondent's cessation of subsistence payments to him for work within the Sacramento area—"I can thank the [LIU] for that. Because of the Union, it had make Jeff Reed mad." Wallen denied that Respondent increased subsistence pay for its employees to slow or deter their support for the LIU and asserted that Respondent implemented the increase based upon comments to its foremen by employees on their crews and after a secretary conducted a "survey." However, neither any foreman nor the secretary, who assertedly conducted the so-called survey, was called as a witness to corroborate Wallen, whom I found to be an untruthful witness, and Respondent also failed to offer the survey itself as corroboration. In these circumstances, I must draw the inference that no corroboration for Wallen's testimony exists, that he fabricated his testimony, and, therefore, that Respondent implemented the increase in order to retaliate against the union organizing campaign. In these circumstances, including the numerous other violations of Section 8(a)(1), which I have previously determined, I conclude that, however nominal it may appear,[67] Respondent's increase of its employees' daily subsistence payment was likewise violative of a Section 8(a)(1) of the Act. *Capitol EMI Music,* 311 NLRB 997 (1993).

Turning to Respondent's layoff of John Michael Shawn Emminger from May 13 until June 3 and Respondent's layoff of employees Frank Settecase, Eric Henderson, and Patrick McQuerry from August 22 until late September, the consolidated complaints allege, and counsel for the General Counsel argues, that Respondent's acts were undertaken in violation of Section 8(a)(1) and (3) of the Act. In this regard, traditional Board law is well settled. Thus, as explained by the Board in *Naomi Knitting Plant,* 328 NLRB 1279, 1281 (1999), pursuant to *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir.1981), cert. denied 455 U.S. 989 (1981), approved in *Transportation Management Corp.,* 462 U.S. 393 (1983), in order to establish a violation under Section 8(a)(1) and (3) of the Act, the General Counsel must prove, by a preponderance of the evidence, that antiunion animus was a motivating factor in Respondent's conduct. Once such a showing has been made, the burden shifts to Respondent to demonstrate that the same action would have taken place in the absence of, or notwithstanding, its employees' activities in support of the union. To sustain its initial burden of proof, that of persuading the Board Respondent acted out of antiunion animus, the General Counsel must show (1) that the employees were engaged in activities in support of a union; (2) that Respondent was aware of or sus-

[64] I am cognizant that, in *D&F Industries, Inc.*, supra, the Board found direct evidence that the individuals acted as conduits of information from the respondent to the employees.

[65] In accord with my findings, I shall recommend dismissal of pars. (a), (b), (d), and (e) from the consolidated complaint in Cases 20–CA–30721–3, 20–CA–30721–4, and 20–CA–30721–5.

[66] Counsel for the General Counsel ignored this allegation in her posthearing brief.

[67] Respondent does not contend that the $7-per-day subsistence increase was so nominal as to be insignificant and, as such, did not arise to an unlawful benefit.

pected its employees involvement in activities in support of the union; and (3) that the employees' activities in support of the union were a substantial or motivating factor underlying Respondent's actions. Such motive may be established by circumstantial evidence as well as by direct evidence and is a factual issue. *FPC Moldings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir.1965), enfg. 314 NLRB 1169 (1994). Four points are relevant to the above-described analytical approach. First, the Board, in determining whether the General Counsel has established a prima facie showing of unlawful animus, will not quantitatively analyze the effect of the unlawful motive. The existence of such is sufficient to make the acts and conduct at issue violative of the Act. *Wright Line*, supra at 1069 fn. 4. Second, once the burden has shifted to Respondent, the crucial inquiry is not whether Respondent could have engaged in the alleged unlawful acts and conduct but, rather, whether Respondent would have done so in the absence of the alleged discriminatees' support for the union. *Structural Composites Industries*, 304 NLRB 729 (1991); *Filene's Bargain Basement*, 299 NLRB 183 (1990). Third, pretextual discharge cases should be viewed as those in which "the defense of business justification is wholly without merit" (*Wright LIne*, supra at 1089 fn. 5), and the "burden shifting" analysis of *Wright Line* need not be utilized. *Arthur Young & Co.*, 291 NLRB 39 (1998). Finally, regarding the latter point, "it is . . . well settled . . . when a respondent's stated motive for its actions is found to be false, the circumstances warrant the inference that the true motive is an unlawful one that the respondent desires to conceal." *Flour Daniel, Inc.*, 304 NLRB 970, 970 (1991); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

Initially, with regard to John Michael Shawn Emminger, Respondent does not dispute that it laid off Emminger from May 13 until June 3. As to whether the General Counsel met its burden of proof and established that Respondent was unlawfully motivated in doing so, there is clear record evidence that the alleged discriminatee engaged in activities in support of the LIU. Thus, as his testimony on these points was uncontroverted and partially corroborated, I find that, in March 2002, Emminger contacted and met with representatives of the LIU and agreed to distribute authorization cards and that he subsequently spoke to approximately 20 employees, including Frank Settecase, soliciting their signatures on authorization cards in support of representation by the LIU. Next, noting that Emminger himself testified that his solicitations on behalf of the LIU always occurred after work, that he was careful not to permit anyone to observe his activities, and that he never noticed any managers surveiling his solicitations, I agree with counsel for Respondent that there is no specific record evidence that Respondent possessed knowledge of Emminger's activities in support of the LIU.[68] However, "it is well established that where there is no direct evidence, knowledge of an employee's union activities may be proven by circumstantial evidence from which a reasonable inference may be drawn." *Kajima Engineering & Construction*, supra at 1604; *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992). The "circumstantial evidence," necessary for such an inference may include the employer's demonstrated knowledge of union activity generally amongst its employees, the employer's demonstrable unlawful animus, the timing of the employer's action against the employee in relation to the latter's protected activities, and the pretextual nature of the reasons advanced for the alleged unlawful act. Id. Herein, the record establishes that, since the first week of May, after Jerry Morales' conversation with Respondent's president, Jeffrey Reed, Respondent had been aware that the LIU was engaged in an organizing campaign amongst its employees and that, during the May 10 "Christmas" party for Respondent's employees, Reed specifically referred to the employees' possible representation by Laborers Local 185 as not being in the best "interest" of the company. Further, as I found him the more credible witness, I credit Jimmy Isaacs that, in July, when Wallen told him he would no longer receive daily subsistence pay for work within the Sacramento vicinity, the former also averred that Isaacs could "thank Shawn for that." While I recognize Wallen's comment may have been ambiguous, his meaning became clear with his later comment to Isaacs that he could "thank" the LIU for the cessation of his daily subsistence because the LIU had angered Reed. In addition, that Respondent harbored unlawful animus towards the LIU seems apparent based upon Respondent's acts and conduct, which I have previously determined were violative of Section 8(a)(1) of the Act. These acts include Wallen's interrogation of Emminger, his threat to Settecase of more onerous working conditions, and his threat to deprive Isaacs of subsistence pay for work in the Sacramento area if the latter mentioned Respondent's offer of such payments to other employees, Heath's threats of benefits losses, and Jones' threat of physical violence against agents of the LIU. Moreover, as explained, in detail, below, I believe Respondent's defense for the alleged unlawful layoff of Emminger was a sham. Also, I note that Respondent laid off Emminger a mere 2 hours after Wallen interrogated him regarding whether the LIU had contacted him or whether he had contacted the LIU. Finally, as will be discussed in detail later, Respondent engaged in several other acts and conduct, including laying off employees Frank Settecase, Eric Henderson, and Patrick McQuerry and withholding subsistence pay from Jimmy Isaacs, violative of Section 8(a)(1) and (3) of the Act. Accordingly, given the confluence of circumstances herein, including the comments of Mike Wallen, the palpably unlawful threats uttered by Respondent's supervisors and agents, the nature of Respondent's defense to the alleged unlawful layoff of Emminger, and the timing of the layoff of Emminger (occurring immediately after Wallen's unlawful interrogation of him), while not free from doubt, I believe that the record evidence provides a sufficient basis to infer that Respondent had knowledge of or, at least, suspected Emminger's involvement in the nascent organizing campaign, on behalf of the LIU, amongst its employees. Id. Regarding evidence of unlawful animus, while Jeffrey Reed seemingly had no problem with LIU agents speaking to Respondent's

[68] In her posthearing brief, not only did counsel for the General Counsel fail to utilize the *Wright Line*, supra, analytical approach in discussing Emminger's alleged discriminatory layoff but also she failed to address the issue of Respondent's knowledge of Emminger's union activities.

employees, I have found that he also informed the employees that the LIU was not in the best interest of Respondent, that Mike Wallen, Michael Heath, and Anson Jones threatened Respondent's employees with loss of wages and benefits, and bodily injury to union agents in order to induce them to cease supporting the LIU and that Wallen blamed Jeffrey Reed's antipathy for the LIU as the cause the latter's decision to cease subsistence payments to Jimmy Isaacs. In these circumstances, I believe, and find, that counsel for the General Counsel has met her initial burden and established a prima facie showing that Respondent was unlawfully motivated in laying off Emminger.

As to whether Respondent thereafter established that it would have laid off the alleged discriminatee notwithstanding his activities in support of the LIU, I initially note that that the record evidence corroborated Mike Wallen's assertion that, subsequent to May 13, there was little work scheduled for Anson Jones' slurry seal crew. Thus, Respondent's Exhibit 4, the work schedule for Respondent's paving crews, disclosed a paucity of work for Jones' crew from the last week in May through the middle of June. However, as stated above, Wallen's demeanor, while testifying, was that of a deceitful witness. In this regard, neither Jones nor Michael Heath corroborated Wallen's testimony that a pending job in Redding required just six or seven employees or that Heath and he selected Emminger for layoff because Emminger had been away from his family longer than the other employees on Anson Jones' crew. In this regard, while both testified, neither was asked to corroborate Wallen, and, from this failure, I must draw the inference that neither would have corroborated him. Further, Emminger was laid off immediately after returning from a visit to his family in Southern California. In this regard, Heath failed to corroborate Wallen's assertion that Respondent's decision to lay off Emminger was reached in the week prior to Emminger's trip home, and I agree with counsel for the General Counsel it is compelling that Respondent assertedly laid off the alleged discriminatee in order to afford him time with his family without ever inquiring if the latter desired such time. Based upon my belief that Mike Wallen was a disingenuous witness, the lack of corroborating evidence, and the extraordinary and disturbing amount of unlawful animus herein, I find that Respondent's defense, with regard to the alleged unlawful layoff of Emminger, was a canard and, therefore, that it failed to establish that it would have laid off the alleged discriminatee notwithstanding his activities in support of the LIU.[69] Accordingly, I believe, and find, that Respondent's layoff of Emminger was in violation of Section 8(a)(1) and (3) of the Act. *Kajima Engineering & Construction*, supra.

Turning to the Respondent's alleged unlawful layoffs of employees Frank Settecase, Eric Henderson, and Patrick McQuerry, there is no dispute that each was laid off on August 22. As to whether counsel for the General Counsel established a prima facie violation of Section 8(a)(1) and (3) of the Act, Frank Settecase was uncontroverted that he executed an authorization card for Laborers Local 185, which was given to him by alleged discriminatee Emminger; that, prior to the employees' May "Christmas" party, he spoke to Mike Wallen, who said there were union officials sitting inside the restaurant, and said he had been a union member at one time and would not mind speaking to the LIU representatives; that, while on a job in Watsonville in August, along with other employees on Anson Jones' crew, including Eric Henderson and Patrick McQuerry, he attended a dinner meeting with LIU representatives; and that, as shown in a newspaper photograph, he often wore a Laborers Local 185 logo shirt over his work shirt while working. While alleged discriminatee Henderson failed to complete his testimony at the hearing, according to Settecase, the former also attended the August union meeting in Watsonville, and, while alleged discriminatee McQuerry failed to testify at the hearing, according to Settecase, McQuerry also attended the August union meeting and wore a Laborers Local 185 logo shirt at work. Concerning Respondent's knowledge or suspicions that Settecase, Henderson, or McQuerry were supporters of the LIU organizing campaign, Mike Wallen failed to deny Settecase's account of their conversation prior to the Christmas Party and failed to deny Settecase's testimony that, on the day of the employees' dinner meeting with LIU officials in Watsonville, he had invited the members of Jones' crew to dinner but was told by the employees of their scheduled dinner meeting. Moreover, crediting Settecase, who was uncontroverted, it is inconceivable that Jones failed to notice the employees on his crew wearing Laborers Local 185 logo shirts during work, and Respondent's agent failed to deny observing his crew members wearing such clothing. With regard to the existence of unlawful animus, I have previously discussed the unlawful and coercive threats, attributed to Heath, Jones' threat of physical harm to union agents, and Wallen's comment regarding Jeffrey Reed's anger at the LIU. However, on this point, I do not believe Jimmy Isaacs' testimony regarding asserted comments, demonstrating Respondent's unlawful animus, which he attributed to Anson Jones. Thus, I note that Isaacs placed Jones comments on a nonexistent job and, in any event, the scant record evidence, regarding the level of Settecase's, Henderson's, and McQuerry's support for the LIU, hardly arises to labeling them "troublemakers." Nevertheless, as a quantitative analysis is not required, I believe the General Counsel offered sufficient record evidence to establish a prima facie showing that Respondent was unlawfully motivated in laying off alleged discriminatees Settecase, Henderson, and McQuerry.

As to whether Respondent met its burden of proof, establishing that it would have lain off Settecase, Henderson, and McQuerry notwithstanding its unlawful animus, Respondent's president, Jeffrey Reed, offered a general economic defense as Respondent's rationale for the necessity of layoffs at the end of August. He testified that Respondent's revenues were significantly lower in 2002 than in the previous year due to a lack of available CalTrans paving jobs, upon which to bid and work, resulting from the California state legislature's inability to pass a budget for the next fiscal year. According to Reed, the effect upon Respondent was that, without any CalTrans jobs—

[69] In so concluding, I have considered that Emminger's testimony, that he used a company vehicle to visit his family on, at least, two or three occasions in the 1-month period between mid-April and May 13, appears to be blatantly untrue.

especially for Anson Jones' crew, which, apparently, performed the CalTrans jobs during the summer months, it could not afford to maintain the same number of work crews as it had in the past. While General Counsel's Exhibit 6 does disclose that Respondent steadily laid off employees in all job classifications during the summer and early fall of 2002—13 including the three alleged discriminatees, Respondent offered no corroboration for Reed's assertions that, during its 2002–2003 fiscal year, Respondent experienced as great as a 76-percent drop in gross revenues from 2001 or that its August 2002 gross revenues declined from "3.7 million" to "1.6 million." In the latter regards, "one reasonably would expect some independent corroborating proof of the Respondent's extraordinary conditions in its business that would necessitate layoffs." *Power Equipment Co.*, 330 NLRB 70, 75 (1999). Indeed, the Board has held that it is "incumbent" upon an employer, who asserts an economic defense, to proffer more than oral testimony. *Reeves Rubber, Inc.*, 252 NLRB 134, 143 (1980). Moreover, while Reed stressed the effect of the lack of CalTrans work on Anson Jones' crew, other than Shawn Emminger, whose layoff, I have found, was discriminatory, until the layoffs of the three alleged discriminates—assertedly for impending lack of work—in the last week of August, there is no record evidence of prior 2002 layoffs from Jones' crew, and there is no corroborating record evidence establishing a lack of work for his slurry seal crew in September.[70] In fact, I note that the work schedule for Respondent's paving crews, Respondent's Exhibit 4, which ends in August, discloses steady work for Jones' crew during that entire month. Regarding the selections of Settecase, Henderson, and McQuerry for layoff, while merely maintaining he adhered to Respondent's guidelines for selecting employees for layoffs, other than noting neither possessed a class A driver's license, Wallen failed to offer any details as to how application of the guidelines resulted in the selection of the alleged discriminatees. Moreover, Wallen stated that he had considered the seniority of each alleged discriminatee, and, in his position statement to Region 20, Respondent's attorney claimed that the three had the least seniority of Respondent's remaining squeegeemen. However, this assertion was demonstrably untrue. Thus, analysis of General Counsel's Exhibit 6 discloses that, of the 13 squeegeemen remaining on Respondent's payroll in August, no fewer than 8 had lower seniority than Settecase, and three had lower seniority than Henderson. Further, at least four squeegeemen, two traffic control employees, and two seal coat employees had lower seniority than McQuerry. Finally, I note that, in his position statement to Region 20, Respondent's attorney directly contradicted Wallen with regard to when, in September, Respondent offered recall to Settecase. In these circumstances, and based upon the record as a whole, I do not believe that Respondent has sustained its burden of proof, and, therefore, I find that its layoffs of Settecase, Henderson, and McQuerry violated Section 8(a)(1) and (3) of the Act.

With regard to Respondent's elimination of subsistence pay to Jimmy Isaacs and subsequent reinstatement of his subsistence pay at a reduced rate, in accord with my belief that the alleged discriminatee should be credited over the mendacious Mike Wallen, I find that, prior to July, Isaacs had received daily subsistence pay for work in the Sacramento area; that; in early July, Wallen informed Isaacs that it was Respondent's policy not to give daily subsistence pay while employees were working in the Sacramento area and that he would receive no more subsistence pay after that week; that, from July 3 through July 19, Isaacs worked jobs in the Sacramento area and received no daily subsistence payments; that, on or about July 20, Wallen informed Isaacs that, for work within the Sacramento area, he would be paid 4 days of subsistence pay per week: and that, thereafter, notwithstanding Wallen's commitment, Isaacs was only sporadically paid daily subsistence for work within the Sacramento area. As to whether Respondent's acts and conduct were violative of Section 8(a)(1) and (3) of the Act, other than his presence at a meeting between his stepson Emminger and LIU official Morales, there is no record evidence that Isaacs engaged in any activities in support of the LIU or that Respondent knew or suspected Isaacs supported the LIU organizing campaign. However, I have previously concluded that, when Wallen informed Isaacs that Respondent would no longer pay him daily subsistence for working within the Sacramento area, the former added that Isaacs "could thank Shawn for that" and that, when Wallen informed Isaacs his daily subsistence pay for work within the Sacramento area would be partially restored, he added that Isaacs could "thank the Union" for the cessation of his subsistence because "it had made Jeff Reed mad." Arguing that these comments reveal that Respondent acted against Isaacs' daily subsistence payments in Sacramento for retaliatory rather than business considerations, counsel for the General Counsel contends that "the Board has consistently held that when Respondent punishes a third party because of the union activity or protected concerted activity of a relative, this conduct violates Section 8(a)(3) of the Act." Having considered the Board decisions, cited by counsel, I agree that an employer, which acts against an individual, who has not himself or herself engaged in union or other protected concerted activities, in retaliation for the union or other protected concerted activities of another individual, engages in conduct violative of the Act. *Advertiser's Mfg. Co.*, 280 NLRB 1185 (1986); *Operating Engineers Local 400*, 265 NLRB 1316 (1982); *Dewey Bros., Inc.*, 187 NLRB 137 (1970). Herein, given Wallen's statements to Isaacs, the record warrants the conclusion, as I stated above, that Respondent perceived Shawn Emminger as having been a participant in, or a supporter of, the LIU's organizing campaign and that Respondent acted against Isaacs in retaliation for his stepson's actions and Respondent's employees' support for the LIU.

As to Respondent's defense, I restate my conviction that Mike Wallen was a perfidious and unreliable witness. In this regard, his testimony, concerning the timing of Respondent's decision to change its daily subsistence payment policy and his asserted meetings with the southern California-based employees to inform them of the policy change, was wholly uncorroborated. Moreover, there is no record evidence that, in July, he treated the other employees, who continued to reside in southern California, in an identical manner as Respondent

[70] The Board has held that it is "incumbent" upon an employer, who asserts an economic defense, to proffer more than oral testimony. *Power Equipment Co.*, supra; *Reeves Rubber, Inc.*, 252 NLRB at 143.

treated Isaacs. Further, Wallen conceded issuing no memorandum to employees, announcing the policy change, and I found his reason for not doing so unconvincing. In short, I give no credence to his testimony on these allegations and conclude that Respondent's defense was nothing more than a sham. Accordingly, I find that Respondent's cessation of daily subsistence payments to Isaacs for work within Sacramento and its sporadic reinstatement of such payments to Isaacs were in retaliation for his stepson's and its employees' perceived activities in support of the LIU and, therefore, violative of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. At all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all times material, Laborers Local 185 has been a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees with regard to their union sympathies and activities, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

4. By threatening its employees that selecting Laborers Local 185 as their bargaining representative would result in more onerous working conditions, including loss of subsistence pay, Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

5. By prohibiting its employees against discussing their terms and conditions of employment with their fellow employees and threatening to retaliate for such acts, Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

6. By informing its employees that adverse actions to their terms and conditions of employment resulted from their support for Laborers Local 185, Respondent engaged in conduct violative Section 8(a)(1) of the Act.

7. By threatening its employees with adverse consequences to their terms and conditions of employment, including reduced wages and benefits, because of their support for Laborers Local 185, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

8. By uttering threats of physical harm to agents of Laborers Local 185 in the presence of its employees, Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

9. By increasing the amount of its daily subsistence pay to its employees for work outside the Sacramento area in order to induce them to forgo their support for Laborers Local 185, Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

10. By laying off its employees John Michael Shawn Emminger, Frank Settecase, Eric Henderson, and Patrick McQuerry because of their activities and support for Laborers Local 185, Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

11. By eliminating and, thereafter reinstating on a sporadic basis, daily subsistence payments to its employee, Jimmy Isaacs, for work which he performed in the Sacramento area in retaliation for his stepson's and its employees' support for Laborers Local 185, Respondent engaged in conduct violative of Section 8(a)(1)and (3) of the Act.

12. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

13. Unless specifically found, Respondent engaged in no other unfair labor practices.

THE REMEDY

I have found that Respondent engaged in serious unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. Therefore, I shall recommend that Respondent be ordered to cease and desist from engaging in such acts and conduct and to take certain affirmative actions, which are necessary to effectuate the purposes and policies of the Act. I have concluded that Respondent unlawfully laid off its employee, John Michael Shawn Emminger, from May 13 through June 3, 2002,[71] its employees, Eric Henderson and Patrick McQuerry, from August 22 through September 24, 2002, and its employee, Frank Settecase, from August 22 through September 30, 2002, for discriminatory reasons. Accordingly, I shall recommend that Respondent be ordered to make each employee whole, with interest, for any losses he may have suffered as a result of Respondent's unlawful discrimination against him. Backpay is to computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, having found that Respondent unlawfully ceased making daily subsistence payments to Jimmy Isaacs from July 3 through 19, 2002, and, thereafter, reinstated such payments to Isaacs on a sporadic basis in retaliation for his stepson's and its employees' support for Laborers Local 185, I shall recommend that Respondent be ordered to make Isaacs whole with interest.[72] Back pay is to be computed in accordance with *F. W. Woolworth Co.*, supra, plus interest as computed in *New Horizons for the Retarded*, supra. As such resulted in increased payments to its employees, I shall not recommend that Respondent be ordered to rescind the increase in the daily subsistence payments to employees, which began in mid-July. Finally, I shall recommend that Respondent be ordered to post a notice, informing its employees of what I have required for it to remedy its unfair labor practices.

On these findings of fact and conclusions of law, I issue the following recommended[73]

ORDER

The Respondent, Valley Slurry Seal Company, Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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[71] The General Counsel does not contest Respondent's failure to recall Emminger to work after June 3.

[72] I recognize that this time period includes the July 4 holiday and 2 weekends. I shall leave it to compliance to determine whether Isaacs would have been paid subsistence for those days absent Respondent's discrimination against him.

[73] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Interrogating its employees with regard to their union sympathies and activities.

(b) Threatening its employees that selecting Laborers Local 185 as their bargaining representative would result in more onerous working conditions, including loss of subsistence pay.

(c) Prohibiting its employees from discussing their terms and conditions of employment with their fellow employees and threatening to retaliate for such acts.

(d) Informing its employees that adverse actions to their terms and conditions of employment resulted from their support for Laborers Local 185.

(e) Threatening its employees with adverse consequences to their terms and conditions of employment, including reduced wages and benefits, because of their support for Laborers Local 185.

(f) Uttering threats of physical harm to agents of Laborers Local 185 in the presence of its employees.

(g) Increasing the amount of its daily subsistence payments to its employees for work outside the Sacramento area in order to induce them to forgo their support for Laborers Local 185.

(h) Laying off its employees because of their activities and support for Laborers Local 185.

(i) Eliminating and, thereafter, reinstating at a reduced rate, daily subsistence payments to its employees for work performed in the Sacramento area in retaliation for their relatives' and its employees' support for Laborers Local 185.

(j) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately make John Michael Shawn Emminger, Frank Settecase, Eric Henderson, Patrick McQuerry, and Jimmy Isaacs whole for any losses each may have suffered as a result of its unlawful discrimination against them, in the manner proscribed in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any references to the unlawful layoffs of employes, Emminger, Settecase, Henderson, and McQuerry, and the cessation of subsistence pay to Isaacs and, within 3 days thereafter, notify each of them, in writing, that this has been done and that the respective layoffs and cessation of subsistence pay will not be used against them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll recordds, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Sacramento, California, copies of the attached notice marked "Appendix."[74] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and ail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 13, 2002.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

Dated: December 12, 2003, San Francisco, California

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate our employees with regard to their union sympathies or activities.

WE WILL NOT threaten our employees that selecting Construction and General Laborers Local 185, Laborers International Union of North America, AFL–CIO (Laborers Local 185) as their bargaining representative would result in harsher working conditions, including loss of subsistence pay.

WE WILL NOT prohibit our employees from discussing their terms and conditions of employment with their fellow employees or threaten to retaliate against them for such acts.

WE WILL NOT inform our employees that reductions in their terms and conditions of employment resulted from their support for Laborers Local 185.

WE WILL NOT threaten our employees with adverse consequences to their terms and conditions of employment, including reduced wages and benefits, because of their support for Laborers Local.

[74] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT make threats of physical harm to agents of Laborers Local 185 in the presence of our employees.

WE WILL NOT increase the amount of our daily subsistence pay to employees for work outside the Sacramento area in order to induce them to stop supporting Laborers Local 185.

WE WILL NOT lay off our employees because of their activities in support of Laborers Local 185.

WE WILL NOT eliminate the subsistence pay and, subsequently reinstate such pay at a reduced rate, of our employees in retaliation for their relatives' and our employees' support for Laborers Local 185.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights, guaranteed to them by Section 7 of the Act.

WE WILL, within 14 days of the date of the instant Order, make John Michael Shawn Emminger, Frank Settecase, Eric Henderson, Patrick McQuerry, and Jimmy Isaacs whole for any wages and benefits lost, with interest, as a result of our discrimination against each of them.

WE WILL, within 14 days of the date of the instant Order, expunge from our files any references to our unlawful layoffs and cessation of subsistence pay and inform the above-named individuals that such has been done and that our unlawful actions will never be used against them in any way.

VALLEY SLURRY SEAL COMPANY